(22,312)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 132.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND MARTIN A. BARRETT, PLAINTIFFS IN ERROR,

vs.

ALBERT H. SCHWYHART, HARRY L. REED, AND FRANK NOVAK.

IN ERROR TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print
Certified copy of judgment of circuit court of Daviess county, Missouri.....(omitted in printing)..	1	
Certified copy of opinion of supreme court of the State of Missouri transferring cause to Kansas City court of appeals.....	3	1
Certified copy of order of supreme court of the State of Missouri transferring cause to Kansas City court of appeals.....	11	5
Memorandum as to abstract of record, marked Exhibit A.....	12	6
Order of submission.....(omitted in printing)..	12	
Judgment.....	12	6
Opinion.....	14	7
Motion for rehearing.....(omitted in printing)..	25	
Order overruling motion for rehearing.....(" ")..	31	
Petition for writ of error..	32	15
Bond for writ of error.....	34	16
Assignment of errors.....	37	17

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1912.

	Original.	Print
Order allowing writ of error	39	19
Citation and service on Schwyhart	41	19
Reed	42	20
Novak	43	20
Clerk's certificate	44	21
Writ of error	45	21
Return on writ of error	47	22
Exhibit A—Abstract of record from supreme court of the State of Missouri	a	23
Petition	1	23
Answer of Martin A. Barrett	9	27
Frank Novak	10	27
H. L. Reed	10	27
C., R. I. & P. Ry. Co.	11	27
Reply filed	11	28
Bill of exceptions	12	28
Petition for removal	13	29
Bond for removal	19	32
Judge's certificate to bill of exceptions	23	34
Order filing petition, &c	23	34
Order filing petition and bond for removal	24	34
Order filing answer to petition for removal	24	34
Order for continuance	25	34
Order filing stipulation	25	35
Orders filing demurrers	25	35
Order denying removal	26	35
Order to amend petition	26	35
Order filing motion to elect	27	36
Order overruling motion to elect	28	36
Orders filing answers	28	36
Order filing stipulation	29	37
Orders filing replies	29	37
Order beginning trial	30	38
Order continuing trial	31	39
Order concluding trial	32	39
Verdict	32	39
Judgment	32	39
Order filing motion for new trial	33	40
Order filing motion in arrest of judgment	33	40
Order filing bill of exceptions	33	40
Order overruling motion for new trial	34	40
Order overruling motion in arrest of judgment	34	40
Order granting time to file bill of exceptions	34	41
Order granting appeal	34	41
Order filing appeal bond	35	41
Order filing bill of exceptions	35	41
Bill of exceptions	35	41
Demurrer of Barrett	36	42
Novak	37	42
Reed	38	43
C., R. I. & P. Ry. Co.	38	43
Amendment to petition	40	44

	Original.	Print
Exhibit A (*Continued*)—		
Demurrers overruled	41	44
Motion to elect	41	44
Motion to elect overruled	41	44
Stipulation as to testimony (omitted in printing)	42	
Stipulation as to testimony (" ")	43	
Testimony of Albert H. Schwyhart (omitted in printing)	44	
George W. Martin (omitted in printing)	101	
Russell P. Snyder (omitted in printing)	107	
Frank Novak (omitted in printing)	114	
S. W. Grove (" ")	117	
Dr. T. E. Potter (omitted in printing)	123	
M. P. Gregory (omitted in printing)	146	
Elza E. Kindig (omitted in printing)	157	
John Wathen (omitted in printing)	169	
T. H. Thompson (omitted in printing)	173	
George G. Tedrick (omitted in printing)	176	
Noel Leatch (omitted in printing)	184	
Albert H. Schwyhart (recalled) (omitted in printing)	192	
B. B. Boyd (omitted in printing)	193	
Dr. J. K. Graham (omitted in printing)	196	
Dr. George Senn (omitted in printing)	209	
Dr. W. L. Kenney (omitted in printing)	217	
Albert H. Schwyhart (recalled) (omitted in printing)	219	
Dr. John L. Dunsmore (omitted in printing)	233	
Dr. Charles Pipkin (omitted in printing)	256	
Marion Schwyhart (omitted in printing)	264	
Dr. John Punten (omitted in printing)	279	
Dr. —— Pitts (omitted in printing)	303	
James R. Miller (omitted in printing)	310	
Dr. Fred Thompson (omitted in ing)	332	
Dr. Louis Munn (omitted in printing)	371	
Dr. C. H. Wallace (omitted in printing)	387	

	Original.	Print
Exhibit A (*Continued*)—		
Testimony of Eugene McQueen (omitted in printing)	407	
J. P. Easter (omitted in printing)	419	
Martin A. Barrett (omitted in printing)	428	
James Riggs (omitted in printing)	452	
M. W. Gardner (omitted in printing)	457	
Fred C. Weldon (omitted in printing)	460	
L. C. Williams (omitted in printing)	463	
R. P. Snyder (omitted in printing)	467	
Isaac Babbett (omitted in printing)	468	
Marion Schwyhart (recalled) (omitted in printing)	471	
George Tedrick (recalled) (omitted in printing)	473	
Elza Kindig (recalled) (omitted in printing)	476	
John Wathen (recalled) (omitted in printing)	478	
N. P. Gregory (recalled) (omitted in printing)	479	
Elmer E. Sutton (omitted in printing)	481	
N. P. Gregory (recalled) (omitted in printing)	482	
John Wilder (omitted in printing)	483	
James Miller (recalled) (omitted in printing)	485	
Fred Novak (cross) (omitted in printing)	485	
Exhibit D—Blue print....(omitted in printing)	487	
A—Photograph....(" ")	488	
B—Photograph....(" ")	489	
C—Photograph....(" ")	490	
Plaintiffs' requests to charge (omitted in printing)	491	
Defendants' requests to charge (omitted in printing)	501	
Verdict	505	45
Motion for new trial	506	45
Motion in arrest	508	46
Affidavit for appeal	510	47
Judge's certificate to bill of exceptions (omitted in printing)	511	
Stipulation as to parts of record to be printed	520	47

* * * * * * *

1-3 And also on the same day the following order of transfer from the Supreme Court of the State of Missouri was filed in the office of the Clerk of the said Kansas City Court of Appeals which is in words and figures as follows to-wit:

In the Supreme Court of Missouri, Division No. 1, October Term, 1909.

ALBERT H. SCHWYHART, Resp.,
vs.
MARTIN A. BARRET et al., App's.

Plaintiff sued the defendants the Chicago, Rock Island and Pacific Railway Company, Martin A. Barrett, Frank Novak, and H. L. Reed for damages for personal injuries alleged to have been sustained by him through the negligence of the defendants; the negligence of the railway company consisted, as the petition charged, in the negligent acts of the individual defendants who, it is alleged, were the servants of the railway company operating or directing the operation of its engine and cars which caused the injuries. Plaintiff recovered a judgment against all the defendants for $7500.00 on December 14th, 1906, from which judgment the defendants appealed to this court and the record was duly lodged here January 19th, 1907. At the date of the appeal and the date of the filing of the record here the amount in controversy was sufficient to give this court jurisdiction, but by an act of the General Assembly approved June 12th, 1909 (Acts 1909, p. 397), the courts of appeals were given jurisdiction in causes "where the amount in dispute, exclusive of costs, shall not exceed the sum of seventy-five hundred dollars." And by that act all cases within its purview then pending in this court, not under submission were to be transferred to the proper court of appeals to be there heard and determined.

4 Counsel on both sides have agreed that this court had jurisdiction, and insist that it be not transferred; but of course consent cannot give jurisdiction of the subject.

Counsel for defendants are of the opinion that there is a federal question involved which gives this court jurisdiction under Section 12, Article VI of our state Constitution, the question being the right of the railway company to have the cause removed to the United States Circuit Court for trial.

Counsel on both sides are of the opinion that in estimating the amount of dispute with reference to the Act of 1909 interest must be added to the amount of the judgment appealed from $7500.00 from its date, December 14th, 1906, to the date of the act of the General Assembly above mentioned, to-wit, June 12, 1909, which would raise the sum beyond the jurisdiction by that act conferred on the Courts of Appeals.

The federal question.—The words used in that clause of Sec. 12, Art. VI of our State constitution which gives this court jurisdiction are: "in cases where the validity of a treaty or statute of or authority exercised under the United States, is drawn in question:" To give this court jurisdiction under that clause there must be a question of the validity of a treaty or the validity of a statute or the validity of an authority exercised under the United States. Of course there is no treaty or statute in question and the only suggestion is that by proceeding to try the cause after the petition to remove was filed the validity of an authority exercised under the United States was denied. No one has questioned the validity of the Act of Congress under which the application for removal was made, or that the cause should have been removed if it was one which under the terms of that act was removable. Even if the state court had misconstrued the act, the misconstruction would not have drawn in question its validity. In Vaughn v. Wabash R. R. Co., 145 Mo. 57, the defend-
ant plead as a defense a compliance with a section of the
5 interstate act of Congress which compliance was denied in
the reply, the court said: "The validity of that Federal statute was not drawn in question. The reply put in issue the averment of compliance with the law, not its validity." In White L. S. Com. Co. v. Ry. Co., 157 Mo. 518, the court said: "While by the Constitution exclusive appellate jurisdiction is vested in this court in cases where the validity of a statute of the United States is drawn in question (Art. 6, Sec. 12) we know of — constitutional provision vesting such exclusive jurisdiction in this court in cases merely involving the construction of a federal statute." In Carey v. Schultz, 221 Mo. 133, where the right of action was based on a statute of Colorado and it was claimed by appellant that a federal question was involved, because the trial court having construed the Colorado statute to be a penal statute refused to enforce it, thereby refusing to give full faith and credit to the public act of another state as required by Sec. I, Art. IV of the Constitution of the United States, but this court held in that case that even id the trial court had misconstrued the statute and had based its judgment on such misconstruction, yet it did not question the validity of the statutes and decisions of the Supreme Court of the United States, cited in that opinion of that case sustaining that view. Therefore even if the trial court in the case at bar had misconstrued the Act of Congress in reference to removal of causes or if it had erroneously decided that under the facts of the case, as presented under the petition for removal, the defendant had not made out a case for removal under the Act of Congress still the validity of the Act was not questioned or the authority to remove when a case under the statute was made. The worse that the defendant can say is that the trial court misconstrued the statute or misinterpreted the pleadings or misunderstood the facts, all of which questions the defendant would have the right to ask any appellate court which has jurisdiction of the cause to review but they raise
no federal question and we neither give or intimate any
6 opinion concerning them. We hold that there is no federal
question in the case and that we have no jurisdiction on that ground.

2. Until the Act of June 12, 1909 (Acts 1909, p. 397), the pecuniary limit, to the jurisdiction of the courts of appeals was $4500.00 but by that act those courts were given jurisdiction of causes "where the amount in dispute, exclusive of costs shall not exceed seventy-five hundred dollars." Does that mean "the amount in dispute" at the time the judgment appealed from was rendered or does it mean the amount in dispute at the time the General Assembly spoke, June 12, 1909? Other language in the act directing the transference of causes pending in this court shows that it was intended to apply to cases where judgments had been rendered and appeals had been taken years before, and the emergency section of the act shows that the General Assembly took cognizance of the overburdened condition of the docket of this court. We think the natural inference to be drawn is that the mind of the lawmaker was directed to cases where the amount in dispute at the time the judgment appealed from was rendered did not exceed $7500.00 and that there was no thought given to the date of the passage of the act or of the influence that date would have on the effect of the act itself.

If a plaintiff brings suit for damages and states in his petition the amount for which he sues, if he is cast in his suit and appeals, we go back to the petition and say that the amount there claimed is the amount in dispute. If the plaintiff should in such case recover judgment for a certain amount and the defendant appeals the amount then in dispute is the amount of the judgment. The date of the dispute in the one case is that of the filing of the petition, in the other it is that of the rendition of the judgment and in either case the amount in dispute is the amount for which the dispute could at that date have been settled. If not settled then and interest is added by operation of law, not as a part of the amount in dis-
7 pute but as a consequence of withholding it, interest in such case is a mere incident, a mere sequence.

Interest has been running on this judgment three years or more but if interest is to be considered as affecting the question of jurisdiction it would take a case in which the judgment was for $7,500 out of the operation of the statute if the interest had run but a few days or even one day. Therefore if a judgment for $7,500 should be rendered in a few days hence the amount in dispute at the date of the appeal would be more than $7,500 and hence the court of appeals would not have jurisdiction, or if the amount of the judgment was $7,200 and the appeal was taken within a few days of its rendition it would go to the Court of Appeals but if the party aggrieved should wish to get his case into this court he could wait ten months during which the interest would accumulate to an amount which added to the original judgment would make the amount in dispute exceed $7,500 and he could then sue out a writ of error and bring his case to this court. We are satisfied that the General Assembly intended to give the Courts of Appeals jurisdiction of causes wherein the amount in dispute at the date of the judgment did not exceed $7,500.00.

There is nothing in what this court said in Pittsburg B. Co. v. Transit Co. 205 Mo. 176 to which we are refer-ed that is in conflict

with what we have above said: In that case although the judgment was for an amount beyond the then pecuniary jurisdiction of the courts of appeals, yet the record showed that the defendant at the trial admitted that it owed the plaintiff the amount sued for but plead two counter-claims one for $4,300, and the other for $142.74 the plaintiff admitted that it owed the last mentioned counter claim but denied the other one for $4,300 and the trial resulted in allowing the defendant $1,850 on the disputed counter claim and deducted that amount from the amount sued for and gave judgment for
8 the balance and defendant appealed. This court said that the only amount in dispute was the difference between $4,300 which defendant claimed as due him on his first counter claim and $1,850 which the court allowed him on that claim and therefore the case was within the jurisdiction of the court of appeals. In that case we took the pleadings and the judgment at its date.

In Vanderberg v. Gas. Co. 199 Mo. 455 the plaintiff had sued in an action ex delicto alleging her damages $5,000, compensatory, and $5,000 penal. The trial court sustained a demurrer to the evidence and plaintiff appealed. The record showed that there was no ground for the claim of punitive damages and that if she was entitled to any compensatory damages they were not more than one or two hundred dollars. There is nothing in that case bearing on the question now in hand.

In state ex rel Broaddus 212 Mo. 685 it was held that after a judgment had been rendered for $5,500 and several months' interest had accrued, a remittitur of $1,000 was entered, but the old judgment was not set aside and a new judgment entered as it should have been, the remittitur was to be treated only as a credit on the amount due on the original judgment which with interest accrued at that time amounted to $5,632, which left the amount due on the judgment $4,632 at the time the appeal was taken. It was held in that case that if when the remittitur was entered the old judgment had been set aside and a judgment for $4,500 entered it would have been within the jurisdiction of the court of appeals.

We are referred to some decisions of the Supreme Court of the United States but we do not think they sustain the position of the learned counsel. When we are construing a statute of our own state relating to the jurisdiction of our state courts it is not always safe to follow a decision of a federal court construing an act of Congress relating to the jurisdiction of federal courts because
9 those courts exercise a peculiar jurisdiction and the acts of congress concerning the subject are to be viewed from that peculiar standpoint.

In Zeckendorf v. Johnson, 123 U. S. 617 the judgment of the trial court was for $4,304.92 the cause was appealed to the Supreme Court of the Territory of Arizona where a judgment of affirmance was had, and from that judgment, that is the judgment of the Supreme Court of the Territory, appeal was taken to the Supreme Court of the United States.

The court said: "The value of the matter in dispute is to be determined by the amount due at the time of the judgment brought

here for review, to-wit, the judgment of the Supreme Court, of the Territory and not the time of the judgment of the District Court." That is what we day in this case, that is that the amount in dispute is to be determined by the amount due at the date of the judgment from which the appeal is taken.

And to the same effect is District of Columbia v. Gannon, 130 U. S. 227. In that case the court quotes with approval what it said on the same subject in Railroad v. Trook, 100 U. S. 112: "In cases brought here on writ of error for reexamination of judgment of affirmance in the Supreme Court of the District of Columbia, the value of the matter in dispute is determined by the judgment affirmed, without adding interest or costs." Benson M. & S. Co. v. Alta M. & S. Co. 145 U. S. 428 is to the same effect.

Our conclusion is that "the amount in dispute" in this case within the meaning of that term as it is used in the Act of June 12th, 1909 (Acts 1909, p. 397) is $7,500, which is the amount for which the judgment was rendered December 14th 1906.

The cause is therefore transferred to the Kansas City Court of Appeals

All concur.

LEROY B. VALLIANT, *J.*

10 STATE OF MISSOURI, *set:*

I, John R. Green, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the opinion of Division No. 1 of said Court, delivered in the foregoing entitled cause on the 27 day of November 1909, as fully as the same appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of our said Supreme court. Done at office in the City of Jefferson State aforesaid, this 8th day of December, 1909.

[SEAL.]

JNO. R. GREEN, *Clerk,*
By O. T. JOHNSON, *D. C.*

11 In the Supreme Court of Missouri, October Term, 1909.

ALBERT H. SCHWYHART, Respondent,
vs.
MARTIN A. BARRET, FRANK NOVAH, H. L. REED, and THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellant.

Appeal from Daviess Circuit Court.

Now at this day it appearing to the satisfaction of the court that the amount in dispute, exclusive of costs in this cause, does not exceed the sum of seven thousand five hundred dollars, and that this court has no jurisdiction of the same, it is ordered by the court that this cause be and the same is hereby transferred to the Kansas City Court of Appeals.

STATE OF MISSOURI, *ss:*

I, John R. Green, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete copy of the order of the said Supreme Court, entered of record on the 27th day of November 1909 transferring the above entitled cause to the Kansas City Court of Appeals.

Given under my hand and seal of said Court at the City of Jefferson, this 8th day of December 1909.

[SEAL.]

JOHN R. GREEN, *Clerk,*
By O. T. JOHNSON, *D. C.*

12 And also on the same day an abstract of record was filed, and is marked exhibit "A" and attached to the said transcript.

* * * * * * *

And afterwards towit on the 28th day of June 1910, the further following proceedings were had and made of record.

ALBERT SCHWYHART, Respondent,
vs.
MARTIN A. BARRETT, FRANK NOVAK, H. L. REED, and THE CHICAGO, ROCK ISLAND AND PACIFIC RY. CO., Appellants.

Appeal from Daviess County.

Now at this day come the parties aforesaid by their respective attorneys, and the Court being sufficiently advised of and concerning the premises doth consider and adjudge that the judgment aforesaid in form aforesaid, by the said Circuit Court of Daviess County rendered, be affirmed as to defendants Barrett and the Railroad Company.

It is further considered and adjudged by the Court that the judgment be and the same is hereby reversed as to the defendants, Reed and Novak, and that the said appellants recover against the
13 said respondent costs and charges herein expended and have therefore execution.

On the same day the following opinion was filed, which is in words and figures as follows:

14 Inthe Kansas City Court of Appeals, March Term, 1910.

No. 9438.

ALBERT H. SCHWYHART, Respondent,
vs.
MARTIN A. BARRETT, FRANK NOVAK, H. L. REED, and THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellants.

Appeal from Daviess Circuit Court.

This action is to recover damages for personal injuries which plaintiff alleges were caused by the negligence of the defendants. A trial to a jury resulted in a verdict and judgment for plaintiff in the sum of $7,500.00, against all of the defendants. An appeal was granted to the Supreme Court where jurisdiction on appeal was lodged, but during the pendency of the cause in that court, the General Assembly approved an Act enlarging the jurisdiction of the Courts of Appeals (Laws of Mo. 1909, p. 397), and the cause was transferred to this court under the provisions of that Act. Objections offered by defendants to the transfer were disposed of adversely to them in an opinion written by Vallient, J., 122 S. W. Rep. 1049, to which we refer for a statement of the grounds of our jurisdiction.

The injury occurred about 8:45 p. m. January 14, 1905, at Altamont, at the junction of defendant Railway Company's St. Joseph branch road with its main line. Plaintiff was a "hostler" employed in the yards and it was one of his duties to go between the cars of the passenger train scheduled to arrive from St. Joseph at 8:45 p. m. to uncouple the safety chain, steam, air-brake and signal hose. A Pullman sleeping car running from St. Joseph to Chicago was brought in by this train and transferred to the through train which came from Kansas City. Usually the necessary switching of the sleeping car was done by the locomotive of the St. Joseph train which was detached and run back for that purpose but on this occasion, owing to the crowded state of the yards, this locomotive was so hemmed in that it could not be used for switching without delaying the departure of the through train and the locomotive of a freight train was detached and employed to switch the sleeping car.
15 Plaintiff knew the engine of the St. Joseph train had not been uncoupled but did not know that the freight engine had been assigned to do the switching. The train master (defendant Reed) who had control over the movement of trains at Altamont, happened to be there and ordered defendant Barrett, who was foreman of the yards, to use the freight engine to do the switching. Without telling plaintiff, who was a subordinate, of the order, Barrett proceeded to have it executed and, aided by plaintiff, started to do the necessary uncoupling between the cars of the St. Joseph train. Barrett went between the cars on one side, plaintiff on the other. While they were at work between two cars and plaintiff was

stooping, the freight engine, which had been signalled to come on by defendant Novak (a brakeman of the St. Joseph train), backed into the sleeping car with enough force to take out some, if not all, of the slack of the train. As one of the results, plaintiff's head was caught and severely squeezed by the contraction of the space between some of the appliances or attachments at the ends of the cars.

The petition alleges "it was usual and customary and was the rule at the Altamont railroad yards to uncouple the engine of the St. Joseph passenger train, run it down to the cut off between the St. Joseph track and passing track, and back the engine onto the passing train, and up to the point where the passing track connects with the St. Joseph track, and thence easterly onto the St. Joseph track, so as to couple on the Pullman sleeping car from the St. Joseph train, and to place it on the Kansas City track and attach it to the Kansas City eastbound train. It was also the rule and custom in said yards not to couple the said engine onto said Pullman car until after the plaintiff had completed his work in uncoupling the cars and the safety chain, and air brake, steam and signal hose, between each of the cars of said train, including said Pullman car and it was also the rule and custom to begin at the engine and proceed toward the back of the train with each successive coupling. That it was also necessary and was the rule and custom in said yards to disconnect all of the cars of the St. Joseph train and switch them so that the train would be headed west for its departure in
16 the morning. * * * That the said freight engine was a very large and heavy engine, and was backed and pushed against said passenger train, negligently and with great force and violence, so that the slack between the cars where the plaintiff was at work was entirely taken up, and the cars were removed violently and suddenly, and without notice to the plaintiff and without any opportunity on his part to escape from danger. That the defendant Reed, as train master, carelessly and negligently ordered said work to be done, 'in the unusual manner aforesaid, well knowing that the plaintiff's duties required him to go between the cars and that unless notified he would only keep watch of the engine of the St. Joseph passenger train,' and being present in person at the Altamont Railroad yards and carelessly and negligently failed to give to the plaintiff any warning or notice whatever. That the defendant, Martin A. Barrett, as foreman, carelessly and negligently ordered and led the plaintiff into such dangerous situation, without giving to him any warning of danger, 'although he well knew of plaintiff's danger and the unusual way by which the said Pullman car was to be switched," and by his orders and presence, assured the plaintiff that the work could safely be proceeded with, when by the exercise of ordinary care and prudence on the part of said defendant, Barrett, the injury to plaintiff could have been avoided. That the defendant, Frank Novak, although he knew or by the exercise of ordinary care and prudence on his part must have known, of the dangerous situation of the plaintiff, carelessly and negligently signalled said freight engine to back against and onto

the said St. Joseph passenger train, without in any manner warning the plaintiff of his dangerous situation, as it was his duty to do. That said work was negligently and carelessly performed, that the defendants and that the officers, agents and servants of the defendant railway company as well carelessly and negligently failed and neglected to warn plaintiff of his dangerous situation, and all the defendants failed in their duty toward the plaintiff, and that by reason of such negligence and carelessness of the defendants and all of them, the plaintiff was caught with his head between the cars aforesaid, each of the said cars coming in violent contact with his head, so that he was greatly and dangerously and perma-
17 nently wounded and injured by the carelessness and negligence of the defendants as aforesaid," etc. The prayer of the petition was for damages in the sum of $15,000.

The defendants answered separately, pleading assumed risk and contributory negligence in addition to a general denial. Before answering the railway company filed a petition and bond for the removal of the cause to the United States Circuit Court. This defendant was an Illinois and Iowa corporation; plaintiff was a citizen and resident of Missouri, as were also the individual defendants. The grounds alleged for removal were, first, that the action between plaintiff and the petitioner is a separable controversy and that the petitioner is entitled to a removal on account of diverse citizenship and, second, because the individual defendants, Barrett, Novak and Reed "were joined in this action by the plaintiff for the sole and fraudulent purpose of defeating and preventing this defendant, your petitioner, from removing his action from the State court in which it is now pending, to the United States Circuit Court, * * * and for the sole and fraudulent purpose of defeating said jurisdiction of said United States Circuit Court in this action." It is alleged, among other things, that the individual defendants "are men of small means, and have no, or but little property from which a judgment against them, or either of them, in this action, if such were recovered, could be collected, and that this defendant is, and was at the time of the institution of this action, entirely solvent and able to pay any debts that may exist against it, and to pay any judgment which might be recovered against it in this action; that it had a large amount of property, and more than sufficient to pay the amount sued for in this action within the jurisdiction of this Court, and according to the allegations in plaintiff's petition, any act of negligence on the part of the defendants, Martin A. Barrett, Frank Novak and H. L. Reed, alleged to have produced the injury to this plaintiff, was an act of this defendant, and accordingly this defendant is responsible and liable for the same."

Plaintiff answered this petition, denying "each and every allegation of fact stated in said petition for removal as a ground for removal except such facts as appear upon the face of the plaintiff's petition," and averring that "it is not true as alleged by said
18 defendant that 'Martin A. Barrett, Frank Novak and H. L. Reed were joined as defendants in this action by the plaintiff

for the sole and fraudulent purpose of defeating and preventing the petitioner from removing this action from the State court.'"

The petition for removal was verified by an agent of the petitioner but no other affidavits or proof of any kind were offered in support thereof. The court overruled the petition and defendant company duly excepted. Our first concern shall be the contention of the railway company that the trial court erred in denying the petition for a removal and in proceeding to exercise jurisdiction over the cause.

The well settled rule, often recognized by the courts of this State, is that upon proper application being made for a removal of a cause from a State to a Federal court, the State court should proceed no further with the cause and any attempt in that direction will be pronounced coram non judice. Berry v. Railroad, 64 Mo. 533; Stanley v. Railroad, 62 Mo. 508; "The record closes so far as the question of removal is concerned when the petition for removal is filed and the necessary security furnished. It presents then to the State court a pure question of law and that is whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit.

That question the State court had the right to decide for itself and if it errs in keeping the case, and the highest court of the State affirm its decision, this court has jurisdiction to correct the error, considering for that purpose, only the part of the record which ends with the petition for removal." Railway v. Dunn, 122 U. S. 513.

"The mere filing of a petition for the removal of a suit which is not removable, does not work a transfer." Crehore v. Railway, 131 U. S. 240.

Under these rules, the trial court had the right to examine the papers and, if they did not disclose on their face the existence of a removable cause, was justified in refusing to surrender jurisdiction. Counsel, to maintain their contention that the action is severable, not joint, point out that liability of the railway company
19 exists, if at all, by virtue of section 2875, Rev. Stat. 1899, commonly called the Fellow Servant statute, while the liability of the several individual defendants rests not on that statute but on the common law. But nothing is lacking to complete the analogy in principle and rule between the present case and those determined by our own Supreme Court in Lansing v. Railway, 196 Mo. 647; Johnson v. Railway, 203 Mo. 381; Stotler v. Railway, 200 Mo. 107, and by the Supreme Court of the United States in Railroad v. Rixie, 179 U. S. 131; Railroad v. Thompson, 200 U. S. 206; Railroad v. Bohon, 200 U. S. 221.

Perhaps the most instructive of these cases is Railroad v. Thompson, where the plaintiff sued the railroad company and the engineer and conductor of the train. The following questions were put to the court for decision: "1. May a railroad corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of its trains, when it is sought to make the corporation

liable only by reason of the negligent act of its said conductor and engineer in the operation of a train under their management and control, and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence?

2. Is such a suit removable by the corporation, as a separable controversy, when the amount involved exceeds $2,000, exclusive of interest and costs, and the requisite diversity of citizenship exists between the said company and the plaintiff, the citizenship of the individual defendants sued with the company as joint tort-feasors being identical with that of the plaintiff?"

The court noticed with aparent disapproval the sometime rule followed by Federal courts "that a joint action could not be sustained against master and servant for acts done without the master's concurrence or directions, when his responsibility arises wholly from the policy of the law which requires that he shall be held liable for the acts of those he employs in the prosecution of his business."

That rule must be the mainstay of the defendant company's argument here since, in the present case, as in those to which we are referring, the liability of the individual defendants rested on their wrongful acts while that of the corporation defendant sprung from the rule of respondeat superior. The only office of the fellow servant statute was to include fellow servants among those for whose torts the master would be liable. Neither in character nor in the rules and principles by which it is controlled does a cause of action for the tort of a fellow servant differ from any other cause falling within the purview of the rule of respondeat superior. The central idea of the Thompson case is that "a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint," and in the application of that rule, the Supreme Court decided that since the face of the papers disclosed the assertion of a joint action, there was nothing in the relationship of master and servant to preclude them from being held jointly liable for the tort of the servant. But, invoking the rule that "all issues of fact made upon the petition for removal must be tried in the Circuit (Federal) Court," (Carson v. Hyatt, 118 U. S. 279), counsel direct our attention to their contention that the averments that the resident defendants were joined for the fraudulent purpose of defeating the company from removing the cause raise an issue of fact which only the Federal court might try and determine. Plaintiff answers that "The statement in the petition for a removal that the defendants Reed, Novak and Barrett were made defendants for the sole and fraudulent purpose of preventing a removal presents no issuable fact, only a conclusion. Being unsupported by any specific statements of facts on which it is based it amounts to nothing and will be disregarded," citing Gold Company v. Keys, 96 U. S. 199; Bank v. Ford, 114 U. S. 635, and other cases.

We think the petition rightly construed does plead the specific facts from which the pleader draws the conclusion that the joinder was fraudulent, but that the facts pleaded do not reasonably support

the conclusion the pleader would draw from them. We have disposed of the averments to the effect that the liability was not joint and find that, in substance, the only remaining facts on which the conclusion is founded are that the individual defendants are men of small means and that the defendant company is solvent and
21 of great wealth. These facts alone would not support a conclusion of fraud. A person injured by the wrong of another has a right to seek a judgment at law against the wrongdoer regardless of the question of whether he can collect the judgment if one should be recovered. Stotler v. Railroad, supra. A plaintiff's motives should not be impugned from the bare fact that he chooses to join solvent and insolvent defendants in the same action. With all of the facts alleged conceded to be true, the conclusion of fraud still would fail for lack of support. We conclude that the learned trial judge was right in holding that the petition for a removal fails to disclose a removable cause.

Passing to the merits of the case, the first questions to engage our attention are those arising from the insistence that the court should have peremptorily instructed the jury to find for the defendants. The facts already stated were collected from the evidence of plaintiff. Other material facts disclosed by that evidence are as follows: Ordinarily the train from St. Joseph arrived some minutes before the through train in order that the latter might not be delayed by work preparatory to the transfer of passengers baggage, express, etc. But on this occasion the St. Joseph train was late and did not arrive until after the arrival of the through train. It was run up alongside the through train and stopped with the door of the baggage car opposite that of the baggage car of the through train. A gang plank was thrown across and the baggagemen began the transfer of baggage. Freight cars were on the track in front of the St. Joseph train and it was apparent to everyone, including plaintiff, that the engine of that train was blocked so that it could not be used in switching the sleeping car. The weather was very cold, the yards were congested and haste was required in doing the work necessary before the through train could depart. Under ordinary conditions, plaintiff and Barrett were done with their task of uncoupling the St. Joseph train before the engine of that train could get around to the sleeping car, but on this occasion the freight engine was close at hand and did not wait for them to finish their work before it coupled on to the sleeping car. The freight engine was large and heavy, but the evidence does not show that the impact of its collision with the sleeping car was unusually violent or severe, though it
22 was hard enough to take some of the slack out of the St. Joseph train. It does not appear that the injury was caused by the severity of the impact but by the fact that plaintiff was not expecting the blow and was caught unawares with his head in a dangerous place. The accusations of negligence thus are stated in plaintiff's brief: "The negligence charged against Barrett is failure to notify plaintiff of the intention to use the unusual engine and leading him into danger. He does not pretend that he notified plaintiff. There is no conflict as to this. The negligence charged against Novak is

signalling the engine back at a premature time without notice to plaintiff. There is no conflict as to this. The negligence charged against Reed is ordering the unusual engine to be used without notifying or providing for notice and there is no pretention that he did so." We shall consider these charges in reverse order.

We say, as a matter of law, that Reed is not shown by the evidence to have been negligent. He was guilty of no breach of duty towards plaintiff. As trainmaster, he was the company's ranking official at the scene and gave the order which, in being executed, resulted in the injury to plaintiff, but he was not required to follow that order through the details of its execution. The order implied direction to those charged with its execution to exercise reasonable care and it was not incumbent on this general officer to follow in the footsteps of each subordinate to see that he properly performed his duty. Railroads could not be operated if executive officers were duty bound to stop and work out the details of every movement to be executed in the handling of trains. As is well said by the Court of Appeals in Cullen v. Norton, 126 N. Y. 1: "The manner of the performance of each of the various details of the work by which, as a whole, it is to be conducted, rested necessarily upon the intelligence and care and fidelity of the servants to whom these duties were entrusted." To the same effect is the decision of our own Supreme Court in Relyea v. Railway, 112 Mo. l. c. 95, where it is said: "It was necessary and proper for the conductor to go to the station, and to give orders as to the movement of the train, but it is out of all reason to say that he was in duty bound to follow up each brakeman and see
23 how each movement was executed. There is in our opinion no evidence to show, or tending to show, that the conductor was guilty of any negligence whatever."

Nor does the evidence accuse Novak of negligence. He acted as the pilot of the freight engine and gave the signal for it to come for the sleeping car. He knew that Barrett and plaintiff were at work between cars but Barrett, the foreman of plaintiff, also knew of the order and that the engine would be moved on Novak's signal. The increased danger to plaintiff consisted not in making the coupling while he was between the cars but in making it without warning him, and we think that Novak was entitled to act on the presumption that Barrett had warned plaintiff and that plaintiff, though between the cars, was expecting an ordinary shock and was prepared to meet it as was Barrett. It would be unreasonable to say that Novak should have assumed that Barrett might fail to perform his duty towards plaintiff. To so hold would be to announce a rule which, if observed, would greatly interfere with the practical and efficient operation of railroad trains.

As to the negligence of Barrett, there can be no doubt under the evidence of plaintiff. He should have told plaintiff of the order that the latter might protect his safety either by refusing to go between the cars while the coupling was being made, or, if he went in, by keeping his body from places where it might be caught by the contraction of the space it occupied. He was given no opportunity to look out for himself and Barrett is the man whose duty it was to

see that he had such opportunity. Whether Barrett was a fellow servant of plaintiff or a vice principal of the defendant, company, his negligence was also the negligence of their common master.

We cannot say, as a matter of law, that plaintiff was guilty of contributory negligence. Under all the facts and circumstances disclosed, his conduct is presented as an issue of fact for the triers of fact to solve. Nor do we agree with defendants that the injury was due to a risk assumed by him as a part of his contract of employment. Our recent decision in Lancaster v. Railway, 127 S. W. 607, disposes of this question. It follows from what we have said
24 that the demurrers to the evidence offered by defendants Barrett and the railway company were properly overruled, and that those asked by the remaining defendants should have been sustained.

The principal objection to the instructions given at the request of plaintiff is that "each of the instructions given for plaintiff tells the jury that if the freight engine was used to do the switching without notice to or knowledge of the plaintiff, the act amounted to negligence per se. This was error. So far as this act was evidence of negligence, it was for the jury to determine its effect."

The hypothesis on which the instructions directed a verdict did omit the specific finding that the failure to warn plaintiff of the change in the custom by which the freight engine was substituted for the engine of the St. Joseph train, was negligence, but we think the state of facts submitted, if found to exist, would indisputably lead to the conclusion of negligence.

The rule cannot be gainsaid that "Negligence cannot be conclusively established, as a matter of law, upon a state of facts on which fairminded men of ordinary intelligence may differ as to the inferences to be drawn from it; and when the question of negligence arises upon even a conceded state of facts from which reasonable men might arrive at different conclusions, it must be submitted to the jury and if the inferences to be drawn from the evidence are not certain or incontrovertible, the question of negligence cannot be passed upon by the court." Gratiot v. Railway, 116 No. 450. But where, as here, the facts included in the hypothesis will admit of no other reasonable inference than that of negligence, the court as a matter of law may pronounce the only conclusion permissible under the facts; Luckell v. Building Co., 177 Mo. l, c. 672, where it is said by Gantt J. "When reasonable men may fairly differ on the question the courts do not assume to decide as a matter of law that certain facts constitute negligence, but the proper conclusion to be drawn from a conceded state of facts admitting of but one inference is a question of law. Hence when the court submitted to the jury in this case the finding of the facts above stated and then advised that if they so found they should return a verdict for
25–30 plaintiff, it in no manner usurped the province of the jury."

Other objections urged against the instructions have been examined and are ruled against the contention of defendants. We find no prejudicial error against the defendants Barrett and the

Railway Company and, as to them, the judgment is affirmed. As to the defendants Reed and Novak, the judgment is reversed.

All concur.

J. M. JOHNSON.

* * * * * * *

31 And on the 25th day of July 1910, the said appellants The Chicago, Rock Island and Pacific Ry. Co., and Martin A. Barrett filed a petition for a writ of error from the Supreme Court of the United States to the Kansas City Court of Appeals State of Missouri; which petition is in words and figures as follows:

32 In the Kansas City Court of Appeals.

ALBERT H. SCHWYHART, Appellee,

vs.

MARTIN A. BARRETT, FRANK NOVAK, H. L. REED, and THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellants.

UNITED STATES OF AMERICA,
State of Missouri:

To the Honorable E. J. Broaddus, Presiding Judge of the Kansas City Court of Appeals of the State of Missouri:

The petition of the Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett, respectfully shows, that on the 28th day of June, 1910, the Kansas City Court of Appeals of the State of Missouri, made and entered a final order and judgment herein in favor of the appellee Albert H. Schwyhart, and against your petitioners, in a certain cause wherein Albert H. Schwyhart was plaintiff, and your petitioners, The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett, together with Frank Novak and H. L. Reed, were defendants, for $7500.00 and for costs, as will appear by reference to the record and proceedings in said cause; in which final order and judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of The Chicago, Rock Island and Pacific
33 Railway Company and Martin A. Barrett, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said Kansas City Court of Appeals of the State of Missouri is the highest court of the said state of Missouri in which a decision in this suit and in this matter could be had.

Wherefore, your petitioners pray for the allowance of a writ of error from the Supreme Court of the United States to the Kansas City Court of Appeals of the State of Missouri and the judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States, and the error complained of by your petitioners may be examined and corrected and

said judgment and your petitioners discharged; and for citation and supersedeas; and your petitioners will ever pray.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND
MARTIN A. BARRETT, *Petitioners,*
By M. A. LOW,
PAUL E. WALKER,
BROWN & DOLMAN,
Attorneys for Petitioners.

Filed July 25, 1910. L. F. McCoy, Clerk.

34 And on the same day a bond was filed in the Kansas City Court of Appeals of the State of Missouri, of which this is a copy:

In the Kansas City Court of Appeals.

ALBERT H. SCHWYHART, Respondent,

vs.

MARTIN A. BARRETT, FRANK NOVAK, H. L. REED, and THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellants.

Know all men by these presents, That we the Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett as principals, and the United States Fidelity and Guaranty Company, as surety are held and firmly bound unto Albert H. Schwyhart, Harry L. Reed and Frank Novak in the sum of One Thousand ($1000.00) dollars to be paid to the said obligees their successors, representatives and assigns, to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of July 1910.

Whereas, the above named appellants The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Kansas City Court of Appeals of the state of Missouri.

Now, therefore, the condition of this obligation is such
35 that if the above named appellants The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett shall prosecute their said writ of error to effect and answer all costs and damages rendered, and to be rendered in case the decree shall be affirmed in said Supreme Court, then this obligation shall be void; otherwise to remain in full force and effect.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
By M. A. LOW,
Its Agent and General Attorney.
[GUARANTY SEAL.] UNITED STATES FIDELITY AND GUARANTY COMPANY,
By MERRITT W. LUCAS, *Att'y in Fact.*
JEAN L. LUCAS, *Att'y in Fact.*

Signed — July 25, 1910.

Approved.
E. J. BROADDUS, *P. J.*

STATE OF KANSAS,
County of Shawnee, ss:

On this 23 day of July 1910, personally appeared before me M. A. Low, who being duly sworn deposes and says, that he is the Agent and General Attorney of the Chicago, Rock Island and Pacific Railway Company, and as such Agent and General Attorney is authorized to sign the foregoing instrument, and that the said M. A. Low acknowledged the said instrument to be the free act and deed of the said corporation.

[SEAL.] (Signed) LUTHER BURNS,
Notary Public.

My commission expires April 24, 1911.

36 STATE OF MISSOURI,
County of Jackson, ss:

On this 25th day of July 1910, personally appeared before me Merritt W. Lucas who being duly sworn, deposes and says, that he is the Agent for the United States Fidelity and Guaranty Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and the said Merritt W. Lucas acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] JOHN D. WENDORFF,
Notary Public.

My commission expires March 1, 1912.

And on the same day the following assignment of errors was filed in the Kansas City Court of Appeals, which assignment is in words and figures as follows:

37 In the Kansas City Court of Appeals.

ALBERT H. SCHWYHART, Appellee,
vs.
MARTIN A. BARRETT, FRANK NOVAK, H. L. REED and THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellants.

Assignment of Errors.

The appellants in the above entitled cause, The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett, in connection with their petition for a writ of error herein, present and file therewith their assignment of errors, as to which matters and things they say that the decision and final judgment of the Kansas City Court of Appeals of the State of Missouri entered herein on the 28th day of June, 1910, is erroneous, to-wit:

First. The court erred in holding that The Chicago, Rock Island and Pacific Railway Company was not entitled under the act of

Congress approved March 3, 1887, (24 Stat. 552) as corrected by the act of August 13, 1888 (25 Stat. 433), to have said cause removed to the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri.

Second. The court erred in holding that the provisions of said acts did not entitle The Chicago, Rock Island and Pacific Railway Company, the above named appellant, to have said cause transferred to and heard and determined in the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri.

38 Third. The court erred in holding that the Circuit Court of Daviess County, Missouri has jurisdiction to try and determine said cause notwithstanding the fact that the above named appellee Albert H. Schwyhart was a citizen at the time of the commencement of said cause, and all times since has been a citizen of Missouri, during all of which times the appellant The Chicago, Rock Island and Pacific Railway Company was, and at all times since has been a corporation organized and existing under and by virtue of the laws of the states of Illinois and Iowa, and a citizen of said states, and notwithstanding the fact that the amount in controversy exceeded exclusive of interest and costs the jurisdictional amount provided for in said acts of Congress.

Fourth. The court erred in holding that the provisions of the said acts of Congress did not entitle the above named appellant The Chicago, Rock Island and Pacific Railway Company to have said cause transferred for trial to the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri under the terms and provisions of the act of Congress approved March 3, 1887, as corrected by the act of August 13, 1888, providing for the removal of cases from state courts to United States courts for trial and disposition.

Fifth. The court erred in ordering judgment to be entered against the appellants The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett, or either of them.

Wherefore, the appellants The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett pray that said decision and final judgment may be reversed, and that said appellants may have an adjudication and decree in their favor as herein specified.

M. A. LOW,
PAUL E. WALKER,
BROWN & DOLMAN,
Attorneys for Appellants The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett.

Filed Jul- 25, 1910. L. F. McCoy, Clerk.

39 Whereupon the following order was made allowing the writ of error.

In the Kansas City Court of Appeals.

ALBERT H. SCHWYHART, Appellee,
vs.
MARTIN A. BARRETT, FRANK NOVAK, H. L. REED, and THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Appellants.

The above entitled matter coming on to be heard upon the petition of the appellants The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett, for a writ of error from the Supreme Court of the United States to the Kansas City Court of Appeals of the State of Missouri, and upon examination of said petition and the record in said matter, and desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter, it is ordered that the writ of error prayed for be, and it is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioners The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett, be, and the same is hereby approved; which bond shall operate as a supersedeas bond.

E. J. BROADDUS,
Presiding Judge of the Kansas City Court of Appeals of the State of Missouri.

Filed Jul- 25, 1910. L. F. McCoy, Clerk.

40 Whereupon the following citations were filed to Albert H. Schwyhart, also to Harry L. Reed and to Frank Novak.

41 THE UNITED STATES OF AMERICA, ss:

To Albert H. Schwyhart, Harry L. Reed, Frank Novak, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, thirty days from and after the date hereof pursuant to a writ of error filed in the Clerk's office of the Kansas City Court of Appeals of the State of Missouri, wherein The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable E. J. Broaddus, Presiding Judge of the Kansas City Court of Appeals of the State of Missouri, this 25th day of July 1910.

E. J. BROADDUS,
Presiding Judge of the Kansas City Court of Appeals of the State of Missouri.

A copy of the within citation is received this 29 day of July, 1910, and due and legal service of this citation on behalf of defendant in error Albert H. Schwyhart, is hereby acknowledged.

BOYD DUDLEY &
KENDALL B. RANDOLPH,
Attorneys of Record for Defendant in Error Albert H. Schwyhart.

Filed Jul- 25, 1910. L. F. McCoy, Clerk.

42 THE UNITED STATES OF AMERICA, *ss:*

To Albert H. Schwyhart, Harry L. Reed, Frank Novak, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, thirty days from and after the date hereof pursuant to a writ of error filed in the Clerk's office of the Kansas City Court of Appeals of the State of Missouri, wherein The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable E. J. Broaddus, Presiding Judge of the Kansas City Court of Appeals of the State of Missouri, this 25th day of July, 1910.

E. J. BROADDUS,
Presiding Judge of the Kansas City Court of Appeals of the State of Missouri.

A copy of the within citation is received this 28 day of July 1910, and due and legal service of this citation on behalf of defendant in error Harry L. Reed, is hereby acknowledged.

HARRY L. REED,
Defendant in Error.

Filed Jul- 25, 1910. L. F. McCoy, Clerk.

43 THE UNITED STATES OF AMERICA, *ss:*

To Albert H. Schwyhart, Harry L. Reed, Frank Novak, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, thirty days from and after the date hereof pursuant to a writ of error filed in the Clerk's office of the Kansas City Court of Appeals of the State of Missouri, wherein The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable E. J. Broaddus, Presiding Judge of the Kansas City Court of Appeals of the State of Missouri, this 25th day of July 1910.

E. J. BROADDUS,
Presiding Judge of the Kansas City Court of Appeals of the State of Missouri.

A copy of the within citation is received this 28 day of July 1910, and due and legal service of this citation on behalf of defendant in error Frank Novak, is hereby acknowledged.

FRANK J. NOVAK,
Defendant in Error.

Filed Jul- 25, 1910. L. F. McCoy, Clerk.

44 STATE OF MISSOURI,
Kansas City Court of Appeals:

I, L. F. McCoy, Clerk of the Kansas City Court of Appeals of the State of Missouri, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all the pleadings and papers filed, and of all of the proceedings had in the above entitled cause as the same are entered and now appear of record in my office.

Witness my hand and seal of the Kansas City Court of Appeals of the State of Missouri, hereto affixed at my office in the City of Kansas City Missouri, this 29th day of July, 1910.

[Seal Kansas City Court of Appeals.]

L. F. McCOY,
Clerk of the Kansas City Court of Appeals, of the State of Missouri.

45 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Kansas City Court of Appeals of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said Kansas City Court of Appeals of the State of Missouri, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Albert H. Schwyhart and Martin A. Barrett, Frank Novak, H. L. Reed, and The Chicago, Rock Island and Pacific Railway Company, wherein was drawn in question the construction of *the* clause of the Constitution of the United States, being a right, privilege and immunity claimed under the constitution and statute of the United States, and the decision was against the right, privilege and immunity specially set up and claimed by the defendants under such clause of the said constitution and statute of the United States, and manifest errors hath happened to the great damage of the said The Chicago, Rock Island and Pacific Railway Company and Martin A. Barrett, as by their complaint appears, we being willing that error, if any hath been,

should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the City of Washington filed in the office of the
46 Clerk of the Supreme Court of the United States on or before the 24th day of August, 1910, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable John M. Harlan, Presiding Justice of the Supreme Court of the United States this 25th day of July, in the year of our Lord, One Thousand Nine Hundred and Ten.

[Seal of the United States Circuit Court, Western Division, for the Western District of Missouri.]

ADELAIDE UTTER,
Clerk Circuit Court of the United States for the Western Division of the Western District of Missouri.

Allowed by
E. J. BROADDUS,
Presiding Judge of the Kansas City Court of Appeals of the State of Missouri.

47 In the Kansas City Court of Appeals.

ALBERT H. SCHWYHART, Resp.,
vs.
MARTIN A. BARRETT, FRANK NOVAK, H. L. REED, and THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, App'ts.

STATE OF MISSOURI,
Kansas City Court of Appeals, ss:

In obedience to the command of the writ of error issued from the Supreme Court of the United States of America in the above entitled cause, I, L. F. McCoy, Clerk of the Kansas City Court of Appeals of the State of Missouri, do herewith transfer to the said Supreme Court of the United States of America a duly certified transcript of the record and proceedings of the Kansas City Court of Appeals of the State of Missouri in the said above entitled cause, with all things concerning the same.

In Witness whereof, I have hereunto set my hand and caused the official seal of the Kansas City Court of Appeals of the State of Missouri to be affixed at my office in the City of Kansas City, this 29th day of July, 1910.

[Seal Kansas City Court of Appeals.]

L. F. McCOY,
Clerk of the Kansas City Court of Appeals.

a EXHIBIT "A."

Filed Dec. 9, 1909. L. F. McCoy, Clerk.

In the Supreme Court of the State of Missouri, October Term, 1907.

ALBERT H. SCHWYHART, Plaintiff,
vs.
MARTIN A. BARRETT et al., Defendants.

Abstract of Record.

Hicklin, Leopard & Hicklin, Brown & Dolman, Attorneys for Defendants.

Filed Sep. 18, 1909. John R. Green, Clerk.

1 In the Supreme Court of the State of Missouri, October Term, 1907.

ALBERT H. SCHWYHART, Plaintiff,
vs.
MARTIN A. BARRETT et al., Defendants.

Abstract of Record.

The petition was filed May 24th, 1906, and is, omitting the caption, in words and figures as follows:

Plaintiff states that the defendant, Chicago, Rock Island & Pacific Railway Company, is and was at all of the times hereinafter mentioned, a corporation organized according to law and owned, controlled and operated a line of railway which passes through the county of Daviess, in the state of Missouri, and through the town of Altamont in said county, and at said town of Altamont owned, controlled and operated certain tracks and sidetracks, and switches, as a part of its said railroad, and that the defendants, Martin A.
2 Barrett, Frank Novak and H. L. Reed are residents of the state of Missouri.

That the defendant, Martin A. Barrett, at the time of the injury hereinafter complained of, was employed by defendant company and was foreman of the yards at Altamont and had control of and jurisdiction over the plaintiff in his employment, as hereinafter set forth.

That the defendant, Frank Novak, was a brakeman in the employ of the defendant company.

That the defendant, H. L. Reed, was employed by and was the train-master of the defendant company with full power and jurisdiction to control the movement of its trains at Altamont.

That at said town of Altamont, one line of the defendant's railway system comes from Cameron, and another line from St. Joseph,

Missouri. That at Altamont, said lines converge and that the St. Joseph track above the point of convergence lies north of the track from Cameron known as the Kansas City track. That above the point of convergence, a track passes from the St. Joseph track, and runs in a westerly direction and connects with it at a point about two hundred yards from the point where it diverges as aforesaid, which said track is called the passing track. That north of said passing track are other tracks and switches. That the plaintiff on the 14th day of January, 1905, was in the employ of said
3 defendant company in the capacity of hostler, and worked under and in connection with said defendant, Martin A. Barrett as foreman. That among other things, it was his duty to assist in taking care of the passenger train running between St. Joseph and Altamont, known as Number 22, which arrives at Altamont, when on time, at about 8:45 o'clock P. M. and departed from Altamont for St. Joseph, in the morning, and it was his duty, upon the arrival of said train at Altamont, together with and under the direction of said Martin A. Barrett, to uncouple the steam, air brake and signal hose from between the ends of all of the cars of said St. Joseph passenger train, and in order to do so, it was necessary for him in the proper discharge of his duties, to get between the cars of the train.

That on the night of the aforesaid 14th day of January, 1905, the St. Joseph passenger train aforesaid arrived and stopped on the St. Joseph track, the train being headed in an easterly direction. That at the time of the arrival of said passenger train, there was standing partially on the St. Joseph track and on a cut off between the St. Joseph track and the passing track above mentioned, and on the passing track and headed west, a freight engine and train of cars, the engine of said freight train being standing at a point further west than the point hereinafter mentioned as the place where the plaintiff was injured, and that at said time, there was stand-
4 ing on the Kansas City track a passenger train from Kansas City for Chicago.

That it was the custom of the defendant company to attach a Pullman sleeping car which was brought from St. Joseph to Altamont as a part of the St. Joseph train, to the Kansas City train, and in order to do so, it was usual and customary and was the rule at the Altamont railroad yards to uncouple the engine of the St. Joseph passenger train, run it down to the cut off between the St. Joseph track and passing track, and back the engine onto the passing train, and up to the point where the passing track connects with the St. Joseph track, and thence easterly onto the St. Joseph track, so as to couple on the Pullman sleeping car from the St. Joseph train, and to place it on the Kansas City track and attach it to the Kansas City east bound train. It was also the rule and custom in said yards not to couple the said engine onto said Pullman car until after the plaintiff had completed his work in uncoupling the cars and the safety chain, and air brake, steam and signal hose, between each of the cars of said train, including said Pullman car and it was also the rule and custom to begin at the engine and proceed toward the back of the

train with each successive coupling. That it was also necessary and was the rule and custom in said yards to disconnect all of the cars of the St. Joseph train and switch them so that the train would be headed west for its departure in the morning.

5 That on the night above mentioned, the freight train being on the tracks as aforesaid, the St. Joseph train came to a stand in its usual position on said track, and the plaintiff was ordered by his said foreman, and went in together with his said foreman, to disconnect the hose used for the purposes aforesaid. That after disconnecting the various hose between the engine and the baggage car, he entered between the baggage car and the smoking car, on the north side of the coupling between the cars as was his custom and duty, and the said foreman, Martin A. Barrett, entered on the south side between the same cars. That the cars are so constructed that each has a platform at the end, which said platforms are over the coupling between the cars, and come together or nearly together, so that when the cars are crowded close together there is but a few inches of space between the ends of the cars. That when there is slack in the train, they are further apart than when the slack is taken out. That about a foot from and on each side of the drawbar, or what is commonly known as the coupling, are iron eyes inserted and fastened in the sills of the car and protruding therefrom, so that when the cars are end to end, the said iron eyes are opposite each other. That said eyes are about three inches in diameter and connect one car with the other by a chain, fastened or hooked in said eyes, known as the safety chain.

6 That at the time aforesaid, the plaintiff being between the cars, as aforesaid and in exercise of due care and caution on his part, and solely in the performance of his duty under the instruction of his foreman as aforesaid, had uncoupled the safety chain, and the steam, air-brake and signal hose, and that while engaged in the performance of his duties as aforesaid, and without his knowledge and without any information or notice being given to him whatever, and without waiting until he had performed his duty in connection with disconnecting the fastenings between the other cars, and between the said Pullman car and the chair car, to which it was attached, contrary to the usual custom, the engine of a freight train was run onto the St. Joseph track for the purpose of moving the aforesaid Pullman car. That the engine of the St. Joseph passenger train remained stationery on the track. That the said freight engine was a very large and heavy engine, and was backed and pushed against said passenger train, negligently and with great force and violence, so that the slack between the cars where the plaintiff was at work was entirely taken up, and the cars were removed violently and suddenly, and without notice to the plaintiff and without any opportunity on his part to escape from danger. That the defendant Reed, as train-master, carelessly and negligently ordered said work to be done, "in the unusual manner aforesaid, well knowing that the plaintiff's duties required him to go between the cars and that unless notified he would only

7 keep watch of the engine of the St. Joseph passenger train," and being present in person at the Altamont Railroad yards

and carelessly and negligently failed to give to the plaintiff any warning or notice whatever. That the defendant, Martin A. Barrett, as foreman, carelessly and negligently ordered and led the plaintiff into such dangerous situation, without giving to him any warning of danger, "although he well knew of plaintiff's danger and the unusual way by which the said Pullman car was to be switched" and by his orders and presence, assured the plaintiff that the work could safely be proceeded with, when by the exercise of ordinary care and prudence on the part of said defendant, Barrett, the injury to plaintiff could have been avoided. That the defendant, Frank Novak, although he knew or by the exercise of ordinary care and prudence on his part must have known, of the dangerous situation of the plaintiff, carelessly and negligently signalled said freight engine to back against and onto the said St. Joseph passenger train, without in any manner warning the plaintiff of his dangerous situation, as it was his duty to do. That said work was negligently and carelessly performed that the defendants and that the officers, agents and servants of the defendant railway company as well carelessly and negligently failed and neglected to warn plaintiff of his dangerous situation, and all the defendants failed in their duty toward the plaintiff, and that by reason of such negligence and care-
8 lessness of the defendants and all of them, the plaintiff was caught with his head between the cars aforesaid, each of the said cars coming in violent contact with his head, so that he was greatly and dangerously and permanently wounded and injured by the carelessness and negligence of the defendants as aforesaid, so that by reason of the negligent and careless acts aforesaid his skull was fractured, broken, crushed and indented on the left side, and his left ear was severely cut and injured, and the right side of his head and cheek bone were wounded and cut, so as to leave an unsightly scar thereon, and his eyes were injured and he was made sick and sore and was greatly and permanently injured in his brain and nervous system and eyes, and suffered from severe shock, and was left with a deep depression on the left side of the skull, suffered great pain and anguish of mind and body, and is in constant danger of serious and dangerous sickness, suffers from constant dizziness, and defective vision, and partial paralysis, the pressure of the skull being constant upon the brain, so that he cannot perform his usual work, nor follow his usual vocation, nor sustain physical or mental effort, and suffers greatly when he stoops forward, and suffers from loss of memory and inability to concentrate his thoughts, and in consequence of said injuries, is permanently disabled in mind and body, and wholly incapacitated from earning a living and
9 will continue so disabled, and said injury will increase the conditions aforesaid, as he grows older.

Wherefore, the plaintiff says that by reason of the injuries aforesaid, caused by the negligence and carelessness of the defendants as aforesaid, he is damaged in the sum of fifteen thousand dollars ($15,000.00, for which sum of $15,000.00, together with costs of suit, the plaintiff prays judgment.

KENDALL B. RANDOLPH,
DUDLEY & SELBY,
Attorneys for Plaintiff.

The separate answers of said defendants were filed December 11th, 1906, and are, omitting the captions, in words and figures as follows to-wit:

"Comes now the said defendant Martin A. Barrett and for his separate answer to the plaintiff's petition filed herein denies each and every allegation in said petition contained.

And further answering said defendant states that if the plaintiff was injured as stated in the petition he was injured solely on account of his own carelessness and negligence and by risks and dangers voluntarily assumed by him and not on account of any carelessness or negligence on the part of this defendant.

10 And having fully answered said defendant asks to be dismissed with his cost in this behalf expended.

HICKLIN, LEOPARD & HICKLIN,
BROWN & DOLMAN,
Attorneys for Defendant, Martin A. Barrett."

Comes now the said defendant Frank Novak and for his separate answer to the plaintiff's petition filed herein denies each and every allegation in said petition contained.

And further answering said defendant states that if the plaintiff was injured as stated in the petition he was injured solely on account of his own carelessness and negligence and by risks and dangers voluntarily assumed by him and not on account of any carelessness or negligence on the part of this defendant.

And having fully answered said defendant asks to be dismissed with his costs in this behalf expended.

HICKLIN, LEOPARD & HICKLIN,
BROWN & DOLMAN,
Attorneys for Defendant, Frank Novak.

Comes now the above named defendant, H. L. Reed, and for his separate answer to the plaintiff's petition filed herein, denies each and every allegation in said petition contained.

And further answering said defendant states that if the plaintiff was injured as stated in the petition he was injured solely on account of his own carelessness and negligence and by risks and dan-

11 gers voluntarily assumed by him and not on account of any carelessness or negligence on the part of this defendant.

And having fully answered said defendant asks to be dismissed with his costs in this behalf expended.

HICKLIN, LEOPARD & HICKLIN,
BROWN & DOLMAN,
Attorneys for Defendant, H. L. Reed.

Comes now the above named defendant, The Chicago, Rock Island and Pacific Railway Company, and for its separate answer to the plaintiff's petition filed herein denies each and every allegation in said petition contained.

And further answering said defendant states that if the plaintiff was injured as stated in the petition he was injured solely on account

of his own carelessness and negligence and by risks and dangers voluntarily assumed by him and not on account of any carelessness or negligence on the part of this defendant, its servants, agents or employees.

And having fully answered said defendant asks to be dismissed with its costs in this behalf expended.

HICKLIN, LEOPARD & HICKLIN,
BROWN & DOLMAN,
Attorneys for the Defendant, The Chicago, Rock Island and Pacific Railway Company.

Plaintiff filed a reply consisting of a general denial to each of defendants' answers.

12 The bill of exceptions to the overruling of the defendant, The Chicago, Rock Island and Pacific Railway Company's petition and bond for removal to the United States Circuit Court for the Western District of Missouri, St. Joseph Division, was filed December 21st, 1906, and is in words and figures as follows, to-wit:

In the Circuit Court of Daviess County, Missouri, December Term, A. D. 1906.

ALBERT H. SCHWYHART, Plaintiff,
vs.
MARTIN A. BARRETT, FRANK NOVAK, H. L. REED, and THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendants.

Bill of Exceptions.

Be it remembered that on the 27th day of August, 1906, and before the first day of the September Term, 1906, of this Court, to which cause was returnable, the Chicago, Rock Island & Pacific Railway Company, one of the defendants above named, filed in the office of the Clerk of the Circuit Court within and for said Daviess County, Missouri, a petition and bond, in due form, signed by good and sufficient securities and in the penal sum of five hundred dollars, praying for a removal of this cause from the said Circuit Court of Daviess County, Missouri, into the Circuit Court of the United States for the St. Joseph Division of the Western District of

13 Missouri, which said application and bond for removal are in words and figures as follows, to-wit:

In the Circuit Court of Daviess County, Missouri, September Term, 1906.

ALBERT H. SCHWYHART, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, MARTIN A. BARRETT, FRANK NOVAK, and H. L. REED, Defendants.

Petition for Removal to U. S. Circuit Court.

Your petitioner, The Chicago, Rock Island and Pacific Railway Company respectfully shows:

1. That this action was begun in the Circuit Court of Daviess County, Missouri, on or about the 24th day of May, 1906, by plaintiff, by filing in the office of the Clerk of said Court a petition and by service upon the defendant, your petitioner, of a writ of summons; that said cause is still pending and undetermined, and that the term of said Court to be begun and held in the City of Gallatin, Daviess County, Missouri, on the first Monday in September, 1906, is the first term at which said cause may be tried; that said cause has not yet been tried, and that the defendant, The Chicago, Rock Island and Pacific Railway Company, has not answered or pleaded to plaintiff's petition, and is not required under the laws of
14 this state, or the rules of said Court, to answer or plead to plaintiff's petition until the 3rd day of September, 1906.

2. That this action is founded upon the alleged liability of the defendants for damages resulting from personal injuries to the plaintiff, on or about the 14th day of January, 1905, and alleged to have been caused by the negligence of the defendant, The Chicago, Rock Island and Pacific Railway Company, and Martin A. Barrett, Frank Novak and H. L. Reed, employees of said defendant, The Chicago, Rock Island and Pacific Railway Company; that said cause of action is of a civil nature, and that the plaintiff in his petition claims the sum of $15,000.00 as damages from the defendants, and that the matter in dispute in said controversy exceeds, exclusive of interest and costs the sum or value of $2,000.00, to-wit: $15,000.00.

3. That this action involves a controversy between citizens of different states. That the plaintiff, Albert H. Schwyhart, was at the time of the commencement of this action, and at all times since has been, and now is a citizen and resident of the state of Missouri, and not a citizen or resident of the state of Illinois or the state of Iowa. That the defendant, The Chicago, Rock Island and Pacific Railway Company, is a corporation duly organized under and by virtue of the laws of the States of Illinois and Iowa, having it- principal place of business in the City of Chicago in said State of Illinois,
15 and was at the time of the commencement of this action, ever since has been and still is a citizen of the States of Illinois and Iowa, and not a resident or citizen of the State of Missouri.

4. That this action involves a controversy which is wholly between citizens of different states, as aforesaid, that the alleged cause

of action is a separably controversy which can be fully determined between the plaintiff and your petitioner, and the whole subject matter of the suit is capable of being finally determined between them and complete relief afforded as to the separate cause of action without the presence of the other parties originally made a party to this suit, as the plaintiff seeks to recover against your petitioner solely for the negligence of the defendants, Martin A. Barrett, Frank Novak and H. L. Reed. And your petitioner, The Chicago, Rock Island and Pacific Railway Company says that the said Martin A. Barrett, Frank Novak and H. L. Reed, were joined as defendants in this action by the plaintiff for the sole and fraudulent purpose of defeating and preventing this defendant, your petitioner from removing his action from the state Court in which it is now pending to the United States Circuit Court for the St. Joseph Division of the Western District of Missouri, and for the sole and fraudulent purpose of defeating said jurisdiction of the said United States Circuit Court in this action.

5. That this action involves a controversy which is wholly
16 between citizens of different states, as aforesaid; that the alleged cause of action is a separable controversy which can be fully determined between the plaintiff and your petitioner, and the whole subject matter of the suit is capable of being finally determined between them, and complete relief afforded as to the separate cause of action without the presence of the other parties made a party to this suit, as the petition of the plaintiff does not state a cause of action against the defendants, Martin A. Barrett, Frank Novak and H. L. Reed, and they were made defendants in this suit for the sole and fraudulent purpose of defeating your petitioner from removing this action, as aforesaid, to the United States Circuit Court for the St. Joseph Division, of the Western District of Missouri; that the plaintiff did not have at the time of the institution of this suit, nor has he now, any cause of action against the defendants, Martin A. Barrett, Frank Novak and H. L. Reed, or any reasonable ground upon which to base a cause of action, or upon which to base a recovery against the defendants, Martin A. Barrett, Frank Novak and H. L. Reed, that the alleged cause of action is based upon section 2873 of Chapter 17 of the Revised Statutes of the State of Missouri, 1899, which was at the time of the alleged injuries to the plaintiff, and ever since has been and is now in full force and effect in the
State of Missouri, by the terms of which a Railroad is alone
17 responsible to any of its agents or servants for injuries resulting from, or caused by the negligence of any other agent or servant, while engaged in the work of operating such Railroad; that by the terms of said statute no recovery can be had against the employee for such injuries; and that the defendants, Martin A. Barrett, Frank Novak and H. L. Reed, cannot in any sense be made proper parties defendant in said cause and cannot in any way be subject to a judgment rendered in said cause; that said petition does not state a joint cause of action against said defendants, and that the said Martin A. Barrett, Frank Novak and H. L. Reed, are men of small means and have no, or but little property from which a judg-

ment against them, or either of them, in this action, if such were recovered, could be collected, and that this defendant is, and was at the time of the institution of this action, entirely solvent and able to pay any debts that may exist against it, and to pay any judgment which might be recovered against it in this action; that it has a large amount of property, and more than sufficient to pay the amount sued for in this action within the jurisdiction of this Court, and accord-ng to the allegations in plaintiff's petition, any act of negligence on the part of the defendants, Martin A. Barrett, Frank Novak and H. L. Reed, alleged to have produced the injury to this plaintiff, was an act of this defendant, and accordingly this defendant is responsible and liable for the same.

18 6. Your petitioner offers herewith a bond with good and sufficient surety for entering in the Circuit Court of the United States, for the St. Joseph Division of the Western District of Missouri, the first day of its next session, a copy of the record of this action, and paying all costs that may be awarded by said Circuit Court, if said Circuit Court shall hold that this action was wrongfully or improperly removed thereto, and also for its appearing and entering special bail in said suit, if special bail was originally requisite therein.

Wherefore your petitioner prays that this action may be removed to the Circuit Court of the United States for the St. Joseph Division, of the Western District of Missouri, and that this Court proceed no further herein.

M. A. LOW,
PAUL E. WALKER,
LEOPARD & HICKLIN,
Attorneys for Defendant, The Chicago, Rock Island and Pacific Railway Company.

STATE OF KANSAS,
County of Shawnee, ss:

M. A. Low, of lawful age, being first duly sworn upon his oath deposes and says, that he is the Agent and General Attorney of the above named defendant, The Chicago, Rock Island and Pacific Railway Company, and as such makes and is authorized to

19 make this affidavit; that he has read the above and foregoing petition, and knows the contents thereof, and that the averments and allegations therein are true as he verily believes.

M. A. LOW.

Subscribed and sworn to before me this 3rd day of August, 1906.

[SEAL.] LUTHER BURNES,
Notary Public.

My commission expires April 24th, 1907.

In the Circuit Court of Daviess County, Missouri, September Term, 1906.

ALBERT H. SCHWYHART, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, MARTIN A. BARRETT, FRANK NOVAK and H. L. REED, Defendants.

Bond.

We, The Chicago, Rock Island and Pacific Railway Company, as principal, and John C. Leopard and E. D. Mann as surety are held and firmly bound unto Albert H. Schwyhart the above named plaintiff, in the sum of one thousand dollars, lawful money of the United States of America, to be paid to said Albert H. Schwyhart, his heirs, executors or administrators for which payment well and truly to be made, we bind ourselves, our successors, heirs, representa-
20 tives executors and administrators, jointly and severally, firmly by these presents.

Upon this condition:

Whereas, On or about the 24th day of May, 1906, an action was brought by said Albert H. Schwyhart, against The Chicago, Rock Island and Pacific Railway Company, Martin A. Barrett, Frank Novak, and H. L. Reed in the Circuit Court of Daviess County, Missouri, and is now pending for trial in said Court, and is removable into the Circuit Court of the United States, for the St. Joseph Division of the Western District of Missouri, and by virtue of the act of Congress in such case made and provided; and

Whereas, Said The Chicago, Rock Island and Pacific Railway Company has filed its petition in said Circuit Court for the removal of said action into the Circuit Court of the United States, for the St. Joseph Division of the Western District of Missouri, now, therefore,

The condition, of the above obligation is such that if the above bounden, The Chicago, Rock Island and Pacific Railway Company, or its successors, shall enter or cause to be entered on the Circuit Court of the United States, for the St. Joseph Division of the Western District of Missouri, on the first day of the next term thereof, a copy of the record of this action, and shall pay all costs that may be awarded by said Circuit Court, if said Circuit Court shall hold that this action was wrongfully or improperly removed
21 thereto, and shall then and there enter special bail in said action, if the same were originally requisite therein, and do and perform all other things by law to be done on the removal of actions from state to United States Courts, then the above obligation to be void; otherwise to be and remain in full force and effect.

In Testimony Whereof, said, The Chicago, Rock Island and Pacific Railway Company has caused this bond to be executed by M.

A. Low, its Agent and General Attorney, and said John C. Leopard and E. D. Mann have hereunto set their hands and seals.

Sealed with our seals and dated this 4th day of August, 1906.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, [SEAL.]
By M. A. LOW, *Its Agent and General Attorney.*
JOHN C. LEOPARD. [SEAL.]
E. D. MANN. [SEAL.]

STATE OF MISSOURI,
County of Daviess, ss:

In the Circuit Court, September Term, 1906.

ALBERT H. SCHWYHART, Plaintiff,
vs.
THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, MARTIN A. BARRETT, FRANK NOVAK and H. L. REED, Defendants.

Comes now the above named plaintiff and answering the
22 petition of the defendant Railway Company for a removal of this cause to the St. Joseph Division of the Circuit Court of the United States, for the Western District of Missouri, says that it is not true as alleged by said defendant that "Martin A. Barrett, Frank Novak and H. L. Reed were joined as defendants in this action by the plaintiff for the sole and fraudulent purpose of defeating and preventing the petitioner from removing this action from the State Court."

And further answering the plaintiff denies each and every allegation of fact stated in said petition for removal as a ground for removal except such facts as appear upon the face of the plaintiff's petition. And plaintiff prays the court that the prayer of said defendant's petition for removal be denied.

BOYD DUDLEY AND
KENDALL B. RANDOLPH,
Attorneys for Plaintiff.

And at said September Term, A. D. 1906, said application for removal coming on to be heard, no objection was made to the bond so made and offered upon said application and the Court took said application under advisement and at the following December Term, A. D. 1906, of said Court and on the 10th day of December, A. D. 1906, the Court overruled and denied same and refused to make
23 an order removing said cause into the Circuit Court of the United States, for the St. Joseph Division of the Western District of Missouri, and to the action of the Court in so overruling and denying said application and refusing to make the order of removal as therein prayed by defendant, The Chicago, Rock Island and Pacific Railway Company, at the time and saved its exceptions. And now, on this 21st day of December, 1906, it

being the 11th day of the regular December term, 1906, of said Court, comes defendant, The Chicago, Rock Island and Pacific Railway Company, by its attorneys and presents this, its bill of exceptions and prays that the same may be signed, sealed, allowed, filed and made a part of the record, which is accordingly done this, the 21st day of December, 1906.

J. W. ALEXANDER,
Judge of the Circuit Court of Daviess County, Missouri.

Record Entries.

STATE OF MISSOURI,
County of Daviess, ss:

In the Circuit Court of said county, before the Clerk thereof in vacation, on the 24th day of May, 1906, the following proceedings were had and entered of record to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Petition filed and summons directed to Sheriff of Grundy
24 County, Missouri for defendant H. L. Reed issued; also summons directed to Sheriff of Daviess County, Missouri, for defendants Martin A. Barrett, Frank Novak and Chicago, Rock Island and Pacific Railway Company, issued.

And afterwards, to-wit, on August 27th, 1906, it being in vacation of said Court before the clerk thereof -he following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Defendant files petition and bond for removal to United States Circuit Court.

And afterwards, to-wit, on the 4th day of September, 1906, it being the second day of the regular September term, 1906, of said Court, the following further proceedings were had in said cause to-wit:

25 ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Plaintiff files answer to defendant Railway's petition for removal.

And afterwards, to-wit, on the 8th day of September, 1906, it being the sixth day of the regular September term 1906, of said

Court, the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Continued under advisement on petition for removal to United States Circuit Court.

And afterwards, to-wit, on the 10th day of December, 1906, it being the first day of the regular December 1906 term of said Court, the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

Stipulation filed.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Defendant, Chicago, Rock Island and Pacific Railway Company files separate demurrer.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Defendant Martin A. Barrett files separate demurrer.

26 And afterwards, to-wit, on the same day the following further proceedings were had in said cause to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Defendant H. L. Reed files separate demurrer.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Defendant Frank Novak files separate demurrer.

And to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
VS.
MARTIN A. BARRETT et al.

Application for removal to United States Circuit Court for St. Joseph Division of Western District heretofore filed in this cause is denied.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
VS.
MARTIN A. BARRETT et al.

Pending the consideration of the demurrers, plaintiff has
27 leave to amend his petition by interlineation as follows: By inserting after the word "done" of the twelfth (12th) line of the fourth (4th) page of said petition the following words, to-wit: "In the unusual manner aforesaid, well knowing that the plaintiff's duty required him to go between the cars and that unless notified he would only keep watch of the engine of the St. Joseph passenger train," and by inserting in said petition after the word "danger" of the seventeenth (17) line of the fourth (4th) page thereof the following words to-wit, "Although he well knew of plaintiff's danger and of the unusual way by which said Pullman car was to be switched." Said amendments having been made by leave of Court the separate demurrers of Martin A. Barrett, Frank Novak, H. L. Reed and Chicago, Rock Island and Pacific Railway Company are overruled.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
VS.
MARTIN A. BARRETT et al.

Defendant Chicago, Rock Island and Pacific Railway Company files motion to elect.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

28 ALBERT H. SCHWYHART
VS.
MARTIN A. BARRETT et al.

Defendant Chicago, Rock Island and Pacific Railway Company's motion to elect overruled.

And afterwards, to-wit, on the 11th day of December, 1906, it being the second day of the regular December 1906 term of said Court, the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Defendant Martin A. Barrett files answer.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Defendant Frank Novak files answer.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Defendant H. L. Reed files answer.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

29 ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Defendant Chicago, Rock Island and Pacific Railway Company files answer.

And afterwards, to-wit, on the 12th day of December, 1906, it being the third day of said December term, 1906, of said Court, the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Stipulation Filed.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Plaintiff files reply to defendant Frank Novak's answer.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Plaintiff files reply to defendant H. L. Reed's answer.

30 And afterward, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Plaintiff files reply to defendant Martin A. Barrett's answer.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Plaintiff files reply to defendant, Chicago, Rock Island and Pacific Railway Company's answer.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Comes now parties, plaintiff and defendant by counsel and both announcing ready, the issues herein are submitted to the following jury of twelve (12) men, good and lawful citizens of Daviess County, Missouri, and qualified to sit as jurors, to-wit: J. S. Pilcher, C. M. Hale, N. A. Baker, W. R. Cole, J. T. Henderson, J. N. Callison, W. A. Wafford, A. D. Tibbles, William Mann, William
31 Martin, Frank B. Caldwell and A. T. Peniston, who are duly empaneled and sworn to well and truly try the cause at issue joined, and a true verdict render according to the law and evidence, and the trial of this cause is entered into. Some progress having

been made, and the hour of adjournment having arrived, the further hearing of this cause is laid over until 8:30 o'clock tomorrow morning, the jury being permitted to separate in the meantime, under the usual instructions of the Court.

And afterwards, to-wit, on the 13th day of December, 1906, it being the fourth day of the regular December 1906 term, of said Court, the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Comes now the parties plaintiff and defendant as well as the jury heretofore empaneled and sworn to try this cause as the law directs, and the trial of this cause is resumed. And some further progress having been made, the hour of adjournment having arrived the further hearing of this cause is laid over until 8:30 o'clock tomorrow morning.

And afterwards, to-wit, on the 14th day of December, 1906, it being the fifth day of the regular December 1906 term of said Court, the following further proceedings were had in said cause, to-wit:

32 ALBERT H. SCHYWART
vs.
MARTIN A. BARRETT, FRANK NOVAK, H. L. REED, and CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

Comes now the parties by their respective attorneys as well as the jury heretofore empaneled and sworn to try this cause as the law directs, and the trial of this cause is resumed, and now the said jury having heard all of the evidence, arguments of counsel and received the instructions of the Court, retire in charge of the Sheriff to consider of their verdict. Upon returning into open Court the said jury return the following verdict:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

We, the jury find for the plaintiff and assess his damages at the sum of seven thousand and five hundred ($7,500) dollars.
W. R. COLE, *Foreman.*

It is therefore, considered, ordered and adjudged by the Court, that plaintiff have and recover of defendants the said sum of seven thousand five hundred ($7500.00) dollars damages by the jury so assessed together with costs in this suit expended, and it is further ordered that execution issue therefor.

33 And afterwards, to-wit, on the 17th day of December, 1906, it being the seventh day of the regular December term 1906, of said Court, the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Defendants file motion for new trial.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Defendants file motion in arrest of judgment.

And afterwards, to-wit, on the 21st day of December 1906, it being the eleventh day of the regular December term, 1906, of said Court, the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Defendant C., R. I. & P. Ry. Co., files Bill of Exceptions to Court's action in denying defendant, Chicago, Rock Island and Pacific Railway Company application for removal, which is signed and sealed by the Court and made a part of the record herein.

34 And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Motion for new trial is taken up and considered by the Court and by the Court overruled.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Motion in arrest of judgment, is taken up and considered by the Court, and by the Court overruled.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Defendants have until and during next regular term of this Court to file Bill of Exceptions.

And afterwards, to-wit, on the same day the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Motion and affidavit for appeal filed. Appeal granted to
35 the Supreme Court of the State of Missouri. Appeal Bond fixed at $15,000 to be filed in ten days from adjournment of the present term of Court and approved by the Clerk in vacation.

And afterwards, to-wit, on the 31st day of December, 1906, it being before the Clerk of said Court in vacation, the following further proceedings were had in said cause, to-wit:

ALBERT H. SCHWYHART
vs.
MARTIN A. BARRETT et al.

Defendants file appeal bond in the sum of $15000.00 with J. W. Meade as security, which bond is by me this day approved.

I. J. VOGELGESANG,
Circuit Clerk,
By W. O. TAGUE, *D. C.*

The bill of exceptions *were* duly signed and gled on the 31st day of January, 1907, and within the time allowed by the order of the Court, and is as follows, to-wit:

In the Circuit Court of Daviess County, Missouri.

ALBERT H. SCHWYHART, Plaintiff,
vs.
MARTIN A. BARRETT et al., Defendants.

Bill of Exceptions.

Be it remembered, That heretofore, to-wit, on the 10th day
36 of December, 1906, and during the December, 1906, term of said Court, the plaintiff appearing by his attorneys K. B.

Randolph and Dudley and Selby, and the defendants appearing by their attorneys Brown and Dolman, the following proceedings were had, to-wit:

Said defendants Martin A. Barrett, Frank Novak, H. L. Reed, and The Chicago, Rock Island and Pacific Railway Company filed separate demurrers to plaintiff's petition, which said demurrers, omitting the captions, are in words and figures as follows, to-wit:

Comes now the said defendant Martin A. Barrett and demurs to the plaintiff's petition herein, and as grounds for such demurrer states:

First. That the said petition does not state facts sufficient to constitute a cause of action against this defendant.

Second. That there is a defect of parties defendant in said petition, because the same does not state facts sufficient or tending to show a joint cause of action against this defendant and the defendant, The Chicago, Rock Island and Pacific Railway Company.

Third. That there is a defect of parties defendant in said petition, because the same does not state facts sufficient or tending to show a joint cause of action against this defendant and the defendant, Frank Novak.

Fourth. That there is a defect of parties defendant in said
37 petition, because the same does not state facts sufficient or tending to show a joint cause of action against this defendant and the defendant, H. L. Reed.

HICKLIN, LEOPARD & HICKLIN,
BROWN & DOLMAN,
Attorneys for Defendant Martin A. Barrett.

Comes now the defendant, Frank Novak and demurs to the plaintiff's petition herein, and as grounds for such demurrer states:

First. That the said petition does not state facts sufficient to constitute a cause of action against this defendant.

Second. That there is a defect of parties defendant in said petition, because the same does no- state facts sufficient or tending to show a joint cause of action against this defendant and the defendant, The Chicago, Rock Island and Pacific Railway Company.

Third. That there is a defect of parties defendant in said petition, because the same does not state facts sufficient or tending to show a joint cause of action against this defendant and the defendant, Martin A. Barrett.

Fourth. That there is a defect of parties defendant in said petition, because the same does not state facts sufficient or tending to show a joint cause of action against this defendant and the defendant, H. L. Reed.

HICKLIN, LEOPARD & HICKLIN,
BROWN & DOLMAN,
Attorneys for Defendant Frank Novak.

38 Comes now the defendant, H. L. Reed and demurs to the plaintiff's petition herein, and as grounds for such demurrer states:

First. That the said petition does not state facts sufficient to constitute a cause of action against this defendant.

Second. That there is a defect of parties defendant in said petition, because the same does not state facts sufficient or tending to show a joint cause of action against this defendant and the defendant, The Chicago, Rock Island and Pacific Railway Company.

Third. That there is a defect of parties defendant in said petition, because the same does not state facts sufficient or tending to show a joint cause of action against this defendant and the defendant, Martin A. Barrett.

Fourth. That there is a defect of parties defendant in said petition, because the same does not state facts sufficient or tending to show a joint cause of action against this defendant and the defendant, Frank Novak.

HICKLIN, LEOPARD & HICKLIN,
BROWN & DOLMAN,
Attorneys for Defendant H. L. Reed.

Comes now the said defendant, The Chicago, Rock Island and Pacific Railway Company, and separately and in its own behalf demurs to the plaintiff's petition herein and as grounds therefor states:

39 First. That the said petition does not state facts sufficient to constitute a cause of action.

Second. That several causes of action are improperly joined in said petition. That is to say: That a cause of action at common law for negligence of this defendant's servants and agents has been improperly joined with an action under the statutes of this state for the negligence of a fellow servant of plaintiff.

Third. That there is a defect of parties defendant in said petition, for that the defendants, Martin A. Barrett, Frank Novak, and H. L. Reed, and each of them severally, are improperly joined with this defendant, because the petition does not state facts sufficient or tending to show a joint liability of this defendant with said other defendants or with either of said other defendants.

Fourth. That there is a defect of parties defendant in said petition, for that the defendant, Martin A. Barrett is improperly joined with this defendant, because the petition does not state facts sufficient or tending to show a joint liability of this defendant with said Martin A. Barrett.

Fifth. That there is a defect of parties defendant in said petition, for that the defendant, Frank Novak is improperly joined with this defendant, because the petition does not state facts sufficient or tending to show a joint liability of this defendant with said Frank Novak.

Sixth. That there is a defect of parties defendant in said
40 petition, for that the defendant, H. L. Reed is improperly joined with this defendant, because the petition does not

state facts sufficient or tending to show a joint liability of this defendant with said H. L. Reed.

HICKLIN, LEOPARD AND HICKLIN, AND BROWN AND DOLMAN,
Attorneys for Defendant, The Chicago, Rock Island and Pacific Railway Company.

Afterwards, to-wit, on the same day, December 10th, 1906, and during the said December, 1906, term of said Court, the said demurrers coming on separately to be heard by the Court, pending the consideration thereof, plaintiff is given leave to amend his petition by interlineation as follows: by inserting after the word "done" of the twelfth (12th) line of the fourth (4th) page of said petition the following words, to-wit: "In the unusual manner aforesaid, well knowing that the plaintiff's duties required him to go between the cars and that unless notified he would only keep watch of the engine of the St. Joseph passenger train" and by inserting in said petition after the word "danger" of the seventeenth (17th) line of the fourth (4th) page thereof the following words, to-wit: "although he well knew of plaintiff's danger and of the unusual way by which said Pullman car was to be switched." Which said amendments were by leave of Court allowed, to which action of the
41 Court in allowing the said amendments and each of them, the said defendants and each of them, then and there excepted at the time.

And thereupon and after said amendments had been made, the said Court overruled the said demurrers of said defendants and each of them, to which said action of the Court in overruling said demurrers and in overruling each of them, said defendants and each of them, separately at the time duly expected.

Thereupon the said defendant, The Chicago, Rock Island and Pacific Railway Company filed its motion to elect, which said motion, omitting the caption, is in words and figures as follows:

Comes now the above named defendant, Chicago, Rock Island and Pacific Railway Company and moves the Court to require the plaintiff to elect upon which cause of action he will proceed to trial, whether upon the cause of action for the common law negligence of defendants Barrett and Reed, or for and upon the statutory cause of action for the alleged negligence of defendant, Novak.

HICKLIN, LEOPARD & HICKLIN, AND BROWN & DOLMAN,
Attorneys for Defendant, C., R. I. & P. Ry. Co.

Thereafter, to-wit, on the same day, December 10th, 1906 and during the December, 1906, term of said Court, the Court overruled said defendant's motion to elect; to which action of the
42–504 Court the said defendant, The Chicago, Rock Island and Pacific Railway Company, then and there excepted at the time.

* * * * * * *

505 Thereafter, to-wit, on the said 14th day of December, 1906, and after argument of counsel the jury returned into Court with their verdict, which is in words and figures as follows, to-wit:

ALBERT H. SCHWYHART
vs,
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY et al.

We, the jury, find for the plaintiff and assess his damages at the sum of Seven Thousand and Five Hundred Dollars.

W. R. COLE,
Foreman.

Thereafter, to-wit, on the 17th day of December, 1906, and during the said December, 1906, term of said Court, and within
506 four days after the rendition of said verdict, the said defendants filed their motions for a new trial and in arrest of judgment, which, omitting the captions, are in words and figures as follows, to-wit:

Come now the above named defendants and each of them and move the Court to set aside the verdict of the jury rendered herein and grant them a new trial for the following reasons, to-wit:

1. The Court erred in overruling the separate demurrer of the defendant Martin A. Barrett, to plaintiff's petition.

2. The Court erred in overruling the separate demurrer of defendant, Frank Novak, to plaintiff's petition.

3. The Court erred in overruling the separate demurrer of defendant, H. L. Reed, to plaintiff's petition.

4. The Court erred in overruling the separate demurrer of defendant, The Chicago, Rock Island & Pacific Railway Company, to plaintiff's petition.

5. The Court erred in overruling the motion of defendant, The Chicago, Rock Island & Pacific Railway Company, to require plaintiff to elect upon which cause of action he would proceed to trial.

6. The Court erred in admitting illegal and incompetent testimony on the part of the plaintiff over the objections of defendants.

507 7. The Court erred in refusing to admit competent and legal testimony offered by defendants.

8. The Court erred in refusing to give the instruction prayed for by defendant, The Chicago, Rock Island & Pacific Railway Company at the close of all the evidence, that the finding of the jury must be in favor of said defendant.

9. The Court erred in refusing to give the instruction prayed for by defendant, Martin A. Barrett, at the close of all the evidence that the finding of the jury must be in favor of said defendant.

10. The Court erred in refusing to give the instruction prayed for by defendant, Frank Novak, at the close of all the evidence that the finding of the jury must be in favor of said defendant.

11. The Court erred in refusing to give the instruction prayed for by defendant, H. L. Reed at the close of all the evidence that the finding of the jury must be in favor of said defendant.

12. The Court erred in refusing to instruct the jury as prayed for by defendants in instructions numbered, "nine" and "ten."

13. The Court erred in instructing the jury at the request of plaintiff in instructions numbered, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 and each of them.

14. That the verdict of the jury is contrary to law.

508 15. That the verdict of the jury is contrary to the evidence and against the weight of the evidence.

16. That the verdict of the jury is excessive.

17. That the verdict shows upon its face that it is founded upon a finding by the jury that each of the individual defendants herein was guilty of negligence, contributing to the injury when, as a matter of fact, the pleadings and the evidence did not authorize the finding that all of said in-ividual defendants, or either of them severally, was guilty of negligence.

HICKLIN, LEOPARD & HICKLIN,
BROWN & DOLMAN,
Attorneys for Defendants.

Motion in Arrest of Judgment.

Comes now the said defendants and each of them and move the Court to arrest the judgment herein, for the following reasons, to-wit:

1. That said plaintiff's petition fails to state facts sufficient to constitute a cause of action against said defendants and each of them.

2. That upon the filing of the petition and a good and sufficient bond for removal of this cause to the United States Circuit Court for the St. Joseph Division of the Western District of Missouri, by said defendant, The Chicago, Rock Island & Pacific Railway Company, this Court was divested of all jurisdiction of said cause.

509 3. That upon the whole record, this Court has no jurisdiction over the parties or over the subject matter of this action.

4. That upon the whole record the judgment should be in favor of said defendants and each of them and against said plaintiff.

HICKLIN, LEOPARD & HICKLIN,
BROWN & DOLMAN,
Attorneys for Defendants.

Thereafter, to-wit, on the 21st day of December, 1906, and during the December, 1906 term, of said Court, the said defendants' motion for a new trial coming on to be heard, was, after due consideration by the Court, overruled. To which action of the Court in overruling said motion for a new trial, said defendants and each of them severally at the time duly excepted.

And afterwards, to-wit, on the same day, December 21st, 1906, and during the December, 1906, term of said Court, the said defendant's motion in arrest of judgment, coming on to be heard, was by the Court after due consideration, overruled. To which action

of the Court in overruling said motion in arrest of judgment, said defendants and each of them severally at the time duly excepted.

Thereafter, to-wit, on the same day, December 21st, 1906, and during the December, 1906, term of said Court, and for good
510-519 cause shown, the defendants and each of them were given until and during the next regular term of this Court to file their bill of exceptions.

Thereafter, to-wit, on the same day, December 21st, 1906, and during the December, 1906, term of said Court the said defendants filed their affidavit for appeal to the Supreme Court, which said affidavit for appeal omitting the caption — in words and figures as follows:

Thos. H. Hicklin, agent and attorney for the defendants in the above entitled cause, and having authority as such to make this affidavit, being duly sworn upon his oath says, that this application for an appeal to the Supreme Court of the State of Missouri, is not made for vexation or delay, but because this affiant verily believes that defendants are injured and aggrieved by the judgment of the Court in said cause.

THOS. H. HICKLIN.

Subscribed and sworn to, before me, this 21st day of December, 1906.

[SEAL.] J. J. VOGELGESANG,
Clerk of Circuit Court.

Filed December 21st, 1906.

Thereupon the Court granted said defendants and each of them an appeal to the Supreme Court of the State of Missouri.

* * * * * * *

520 In the Supreme Court of the United States.

No. —.

MARTIN A. BARRETT and THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Plaintiffs in Error,
vs.
ALBERT H. SCHWYHART, HARRY L. REED and FRANK NOVAK, Defendants in Error.

Stipulation as to Printing Record.

It is stipulated and agreed by and between M. A. Low, Counsel for Plaintiffs in Error, and Boyd Dudley and Kendall B. Randolph, Counsel for Albert H. Schwyhart, one of the above named defendants in error, that in order to save expense in the printing of the record herein, and for greater convenience, the following portions of the record, the same being sufficient to show the errors complained of, shall be printed, and no more, to-wit:

Petition for writ of error, page 31.
Bond with approval thereon, page 33.
Assignment of errors, page 36.

Order allowing writ of error, page 39.

Writ of error and allowance thereon.

Citation to Albert H. Schwyhart with acknowledgment of service of attorneys of record thereon.

Citation to Harry L. Reed with personal acknowledgment of service thereon.

Citation to Frank Novak with personal acknowledgment of service thereon.

521 Opinion of the Supreme Court of the State of Missouri transferring the cause to the Kansas City Court of Appeals of the State of Missouri, page 3.

Order of the Supreme Court of Missouri transferring the case to the Kansas City Court of Appeals of the State of Missouri, page 11.

Final order of the Kansas City Court of Appeals of the State of Missouri, page 12.

Opinion of the Kansas City Court of Appeals of the State of Missouri, page 14.

All of Exhibit "A," beginning with the first line on page 1, and ending with the second line from the top on page 42; also beginning with the words "Thereafter, to-wit" in the middle of page 505, and ending at the second line from the bottom on page 510.

Certificate of Clerk to transcript, page 40.

Certificate of transmissal, page 41.

Stipulation as to printing record.

It is further stipulated and agreed that if from oversight or omission any part of the record necessary to present the questions raised by the assignment of errors, be not thus printed, that the plaintiffs in error, or either of them, have the right to include and print, or may be required to print, by either of the defendants in error, any further or additional portions thereof.

M. A. LOW,
Counsel for Plaintiffs in Error.
BOYD DUDLEY,
KENDALL B. RANDOLPH,
Counsel for Defendant in Error, Albert H. Schwyhart.

522 [Endorsed:] No. —. In the Supreme Court of the United States. Martin A. Barrett and The Chicago, Rock Island and Pacific Railway Company, Plaintiffs in Error, vs. Albert H. Schwyhart, Harry L. Reed and Frank Novak, Defendants in Error. Stipulation as to Printing Record.

523 [Endorsed:] File No. 22,312. Supreme Court U. S. October Term, 1910. Term No. 691. The Chicago, Rock Island & Pacific Ry. Co. et al., Pl'ffs in Error, vs. Albert H. Schwyhart et al. Stipulation as to parts of record to be printed. Filed Sept. 8th, 1910.

Endorsed on cover: File No. 22,312. Missouri, Kansas City Court of Appeals. Term No. 132. The Chicago, Rock Island & Pacific Railway Company and Martin A. Barrett, plaintiffs in error, vs. Albert H. Schwyhart, Harry L. Reed and Frank Novak. Filed September 8th, 1910. File No. 22,312.

IN THE

Supreme Court of the United States

October Term, 1912.
No. 132.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, AND MARTIN A. BARRETT,
Plaintiffs in Error,

vs.

ALBERT H. SCHWYHART, HARRY L. REED AND FRANK NOVAK,
Defendants in Error.

In Error to the Kansas City Court of Appeals of the State of Missouri.

INDEX.

The Question for Determination in This Case is Whether the Petition for the Removal of the Suit to the United States Court Should Have Been Allowed.

The controversy between the plaintiff below and the removing defendant was separable... 3

1. No cause of action was stated against either of the resident defendants..... 4
Atlantic Coast Line R. Co. v. Bailey, 151 Fed. Rep. 891..... 8
Central Railroad Co. v. Keegan, 160 U. S. 259 4
Cincinnati, N. O. & T. P. Ry. Co. v. Robertson, 115 Ky. 353..... 8
Davis v. Chesapeake & O. Ry. Co., 116 Ky. 144 8
Gustafson v. Chicago, R. I. & P. Ry. Co., 128 Fed. Rep. 85..... 7

Nelson v. Hennessey, 33 Fed. Rep. 113..... 8
Potter v. New York Central & H. R. R. Co., 136 N. Y. 77..... 4
Slaughter v. Nashville, C. & St. L. Ry. Co., 91 S. W. Rep. 744..... 8
Schwyhart v. Barrett, 145 Mo. App. 382.... 5

2. The statute of Missouri prohibited the joinder of the several causes of action..... 8
Barnes v. Metropolitan Street Ry. Co., 119 Mo. App. 303..... 12
Blackmer & Post Pipe Co. v. Mobile & O. R. Co., 137 Mo. App. 497..... 12
Beattie Manufacturing Co. v. Gerardi, 166 Mo. 142..... 11
Enos v. Kentucky Distilleries & Warehouse Co., 139 Fed. Rep. 342..... 9
Fernandez v. La Mothe, 147 Mo. App. 644... 11
Gardner v. Robertson, 208 Mo. 605..... 11
Hunter v. Wethington, 205 Mo. 284..... 11
Illinois Central R. Co. v. Sheegog, 215 U. S. 308..... 9
Liney v. Martin, 29 Mo. 28..... 10
Mann v. Doerr, 222 Mo. 1..... 11
Martinowsky v. City of Hannibal, 35 Mo. App. 70..... 11
Mertens v. Loenberg, 69 Mo. 208..... 10
M'Allister v. Chesapeake & O. Ry. Co., 198 Fed. Rep. 660..... 9
Nicholas v. Chesapeake & O. Ry. Co., 195 Fed. Rep. 918..... 9
O'Riley v. Diss, 48 Mo. App. 62..... 12
Scott v. Taylor, 231 Mo. 654..... 11
Southworth v. Lamb, 82 Mo. 242..... 12

3. The removing defendant was liable, if at all, under the terms of a Missouri statute; the resident defendants were liable, if at all, only under

the rules of the common law. The causes of action were therefore separable..... 13
Alaska Mining Co. v. Whelan, 168 U. S. 86.. 13
Baltimore & O. R. Co. v. Baugh, 149 U. S. 368.. 13
Butler v. Grand Trunk Ry. Co., 224 U. S. 85. 13
Central R. Co. v. Keegan, 160 U. S. 259..... 13
Chicago, R. I. & P. Ry. Co. v. Stepp, 151 Fed. Rep. 908..... 15
Henry v. Illinois Central R. Co., 132 Fed. Rep. 715..... 15
Jackson v. Chicago, R. I. & P. Ry. Co., 178 Fed. Rep. 432..... 20
Lockard v. St. Louis & S. F. R. Co., 167 Fed. Rep. 675..... 18
Martin v. Atchison, T. & S. F. R. Co., 166 U. S. 399..... 13
Northern Pacific R. Co. v. Hambly, 154 U. S. 349..... 13
Northern Pacific R. Co. v. Peterson, 162 U. S. 346..... 13
Northern Pacific R. Co. v. Dixon, 194 U. S. 338..... 13
New England R. Co. v. Conroy, 175 U. S. 323 13
Prince v. Illinois Central R. Co., 98 Fed. Rep. 1..... 15
Swartz v. Siegel, 117 Fed. Rep. 18..... 15
St. Paul M. & M. Ry. Co. v. Sage, 71 Fed. Rep. 40..... 15
Texas & Pacific Ry. Co. v. Bourman, 212 U. S. 536..... 13
Union Pacific Ry. Co. v. Wyler, 158 U. S. 285 21
Webber v. St. Paul City Ry. Co., 97 Fed. Rep. 140..... 15
4. Under the decisions of the Missouri courts the defendants were not jointly liable to the plaintiff..... 22

McHugh v. St. Louis Transit Co., 190 Mo. 85. 24
Stanley v. Union Depot Ry. Co., 114 Mo. 606. 28
State v. Mossmar, 231 Mo. 474 22
Vearier v. United Engineering, etc., 197 Fed. Rep. 877 27

8. The [illegible] defendants were charged solely with acts of nonfeasance, and under the decision of the Missouri courts, were not personally liable. The only controversy in the petition was between the plaintiff and the removing defendant. 27

American Bridge Co. v. Hunt, 110 Fed. Rep. 302. 37
Bell v. Gatesby, Roll, Abr. 78, pl. 20 28
Bryce v. Southern Ry. Co., 125 Fed. Rep. 958 33
Chesteen v. Reynolds, 1 Comp. 408 28
Chicago, R. I. & P. Ry. Co. v. Gustafson, 128 Fed. Rep. 89 37
Chicago, R. I. & P. Ry. Co. v. Stepp, 151 Fed. Rep. 902 37
Clark v. Chicago, R. I. & P. Ry. Co., 194 Fed. Rep. 985 36
Davenport v. Southern Ry. Co., 124 Fed. Rep. 953. 32
Davenport v. Southern Ry. Co., 195 Fed. Rep. 960. 33
Ewell's Evills on Agency, page 438 28
Fettis v. Sewell, 62 Miss. 419 28
Floyt v. Shenango Furnace Co., 136 Fed. Rep. 589. 34
Henshaw v. Noble, 7 Ohio St. 226 28
Hoffell v. Lawrence, 37 N. J. L. 46 28
Jewell v. Kansas City Belt & Nut Co., 231 Mo. 176. 30
Kelly v. Chicago & Alton R. Co., 122 Fed. Rep. 286 31

Lane v. Cotton, 12 Mod. 488 28
Marsh and Astrey's Case, 1 Leon. 146 28
Murray v. Usher, 117 N. Y. 542 28
McGinnis v. Chicago, R. I. & P. Ry. Co., 200 Mo. 347 35
Prince v. Illinois Central R. Co., 98 Fed. Rep. 1 28
Scheller v. Silbermintz, 98 N. Y. Supp. 230 28
Story on Agency, 9th Edition, Sec. 308 28
Steinhauser v. Spraul, 127 Mo. 541 29
Shaffer v. Union Brick Co., 128 Fed. Rep. 97 34
Southern Railway Co. v. Miller, 217 U. S. 209 36

The decisions of this Court do not establish principles in conflict with the contentions of the plaintiffs in error 38

Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206 40
Chesapeake & O. Ry. Co. v. Dixon, 179 U. S. 131 40
Chicago, B. & Q. R. Co. v. Willard, 220 U. S. 413 40
Chicago, R. I. & P. Ry. Co. v. Martin, 178 U. S. 245 39
Cincinnati, N. O. & T. P. Ry. Co. v. Bohon, 200 U. S. 221 40
East Tennessee, V. & G. R. Co. v. Grayson, 119 U. S. 240 39
Illinois Central R. Co. v. Sheegog, 215 U. S. 308 40
Johnson v. St. Joseph Terminal Ry. Co., 203 Mo. 381 47
Lanning v. Chicago G. W. Ry. Co., 196 Mo. 647 44
Little v. Giles, 118 U. S. 596 38
Louisville & N. R. Co. v. Ide, 114 U. S. 52 ... 38

Louisville & N. R. Co. v. Wangelin, 132 U. S. 599 39
Pirie v. Tvedt, 115 U. S. 41 38
Plymouth Gold Mining Co. v. Amador Canal Co., 118 U. S. 264 38
Powers v. Chesapeake & O. Ry. Co., 169 U. S. 92 39
Sloane v. Anderson, 117 U. S. 275 38
Southern Ry. Co. v. Carson, 194 U. S. 136 ... 40
Southern Ry. Co. Miller, 217 U. S. 209 40
Stone v. South Carolina, 117 U. S. 430 38
Stotler v. Chicago & A. Ry. Co., 200 Mo. 107. 46
Torrence v. Shedd, 124 U. S. 527 39
Whitcomb v. Smithson, 175 U. S. 635 39

The allegations of fact contained in the petition for removal were matters for the exclusive determination of the Federal Court 49

Burlington, C. R. & N. Ry. Co. v. Dunn, 122 U. S. 513 50
Carson v. Hyatt, 118 U. S. 279 50
Chesapeake & O. Ry. Co. v. McCabe, 213 U. S. 207. 50
Crehore v. Ohio & Mississippi Ry. Co., 181 U. S. 240 50
Illinois Central R. Co. v. Sheegog, 215 U. S. 308. 50
Kansas City, F. S. & M. R. Co. v. Daughtry, 138 U. S. 298 50
Kansas City Suburban Belt Ry. Co. v. Herman, 187 U. S. 63 50
Louisville & N. R. Co. v. Wangelin, 132 U. S. 599 50
Madisonville Traction Co. v. Mining Co., 196 U. S. 239 50
Schwyhart v. Barrett, 145 Mo. App. 332 50
Stone v. South Carolina, 117 U. S. 430 50

Texas & Pacific Ry. Co. v. Eastin, 214 U. S. 153. 50
Wecker v. National Enameling, etc., Co., 204 U. S. 176. 52

Apart from the allegations of negligence with which the resident defendants were charged, the petition contained another and distinct controversy between the plaintiff and the removing defendant 52

Adderson v. Southern Ry. Co., 177 Fed. Rep. 571. 70
Barney v. Latham, 103 U. S. 205. 57
Batey v. Nashville, C. & St. L. Ry. Co., 95 Fed. Rep. 868 66
Beuttel v. Chicago, M. & St. P. Ry. Co., 26 Fed. Rep. 50 . . . . . 61, 73
Boatmen's Bank v. Fritzlen, 135 Fed. Rep. 650. 61
Boatmen's Bank v. Fritzlen, 212 U. S. 364. . 62
Chicago & A. Ry. Co. v. New York, L. E. & N. R. Co., 24 Fed. Rep. 516. 63
Connell v. Smiley, 156 U. S. 335. 61
Elkins v. Howell, 140 Fed. Rep. 157. . . . . 61, 73
Fergason v. Chicago, M. & St. P. Ry. Co., 68 Fed. Rep. 177. 64
Fraser v. Jennison, 106 U. S. 191. 57
Geer v. Mathieson Alkali Works, 190 U. S. 428. 62
Gudger v. Western N. C. R. Co., 21 Fed. Rep. 81. 61
Gustafson v. Chicago, R. I. & P. Ry. Co., 128 Fed. Rep. 85 66
Harter v. Kernochan, 103 U. S. 562. 61
Hartshorn v. Atchison, T. & S. F. R. Co., 77 Fed. Rep. 9 73

Henry v. Illinois Central R. Co., 182 Fed. Rep. 715 67
McGuire v. Great Northern R. Co., 158 Fed. Rep. 434 ..... 61, 78
Nichols v. Chesapeake & O. Ry. Co., 195 Fed. Rep. 918 71
Southern Ry. Co. v. Edwards, 115 Ga. 1022. 68
Wheeling Creek Gas, etc., Co. v. Elder, 170 Fed. Rep. 215 ..... 61, 78

Appendix, containing a detailed discussion of the decisions of this Court considering the separable controversy provisions of the Removal Act 75

Balsley v. St. Louis, A. & T. H. R. Co., 119 Ill. 68 94
Central of Ga. Ry. Co. v. Brown, 113 Ga. 414 99
Chesapeake & O. Ry. Co. v. Dixon, 179 U. S. 131 84
Chicago, B. & Q. Ry. Co. v. Willard, 220 U. S. 413 94
Chicago & E. R. Co. v. Meech, 163 Ill. 305... 94
Chicago, R. I. & P. Ry. Co. v. Martin, 178 U. S. 245 82
Cincinnati, N. O. & T. P. Ry. Co. v. Bohon, 200 U. S. 221 86
Chicago & G. T. Ry. Co. v. Hart, 209 Ill. 414. 94
Chicago & W. I. R. Co. v. Newell, 212 Ill. 332. 94
Cincinnati, N. O. & T. P. Ry. Co. v. Robertson, 115 Ky. 858 97
Davis' Admr. v. Chesapeake & O. Ry. Co., 116 Ky. 144 97
East Tennessee, V. & G. R. Co. v. Grayson, 119 U. S. 240 79
Enos v. Kentucky Distilleries, etc., Co., 189 Fed. Rep. 342 97

Williard v. Spartanburg, U. & C. R. Co., 124 Fed. Rep. 796 95
Illinois Central R. Co. v. Sheegog's Admr., 215 U. S. 308 89
Little v. Giles, 118 U. S. 596 79
Louisville & N. R. Co. v. Ide, 114 U. S. 52 ... 75
Louisville & N. R. Co. v. Wangelin, 132 U. S. 599 81
M'Allister v. Chesapeake & O. Ry. Co., 198 Fed. Rep. 660 ..... 93, 95
McCabe's Admx. v. Maysville & Big Sandy R. Co., 112 Ky. 861 91
Murray v. Cowherd, 147 S. W. Rep. 6 97
Pennsylvania Co. v. Ellet, 132 Ill. 654 94
Pirie v. Tvedt, 115 U. S. 41 75
Plymouth Gold Mining Co. v. Amador Canal Co., 118 U. S. 264 78
Powers v. Chesapeake & O. Ry. Co., 169 U. S. 92 88
Schumfert v. Southern Ry. Co., 65 S. C. 332. 88
Slaughter v. Nashville, C. & St. L. Ry. Co., 91 S. W. Rep. 744 97
Sloane v. Anderson, 117 U. S. 275 77
Southern Ry. Co. v. Carson, 194 U. S. 136 ... 88
Southern Ry. Co. v. Grizzle, 124 Ga. 735 98
Southern Ry. Co. v. Miller, 217 U. S. 209 ... 97
Southern Ry. Co. v. Miller, 57 S. E. Rep. 1090 98
Stone v. South Carolina, 117 U. S. 430 77
Torrence v. Shedd, 144 U. S. 527 79
Whitcomb v. Smithson, 175 U. S. 635 82
Winston's Admr. v. Illinois Central R. Co., 111 Ky. 954 87

IN THE

Supreme Court of the United States

October Term, 1912.
No. 132.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, AND MARTIN A. BARNETT,
Plaintiffs in Error,

vs.

ALBERT H. SCHWYHART, HARRY L. REED AND FRANK NOVAK,
Defendants in Error.

In Error to the Kansas City Court of Appeals of the State of Missouri.

Brief for Plaintiffs in Error

STATEMENT.

On May 24, 1906, the defendant in error, Albert H. Schwyhart, filed a petition in the Circuit Court of

Daviess County, Missouri, in which he alleged that while attempting to uncouple the cars of a passenger train he was caught between the cars with which he was working, and injured. It was alleged that the employes of the defendant Railway Company who were in charge of one of its engines negligently and carelessly pushed the cars together. It was also charged that three other employes of the defendant Railway Company, who were likewise made defendants, were negligent, in that, at different times and under different circumstances, they failed to warn the plaintiff that the work of breaking up the train was to be done in an unusual manner. (Transcript, 23, 25-26.)

Thereafter, the plaintiff in error, The Chicago, Rock Island and Pacific Railway Company, within the time required by statute, filed its petition for the removal of the suit to the United States Court, on the ground that the amount in controversy was sufficient and that there was the requisite diversity of citizenship between the plaintiff and the removing defendant; that there was a separable controversy between said parties, which could be fully determined without the presence of the other defendants; and that the resident defendants were fraudulently joined for the purpose of preventing the removing defendant from trans-

ferring the suit to the United States Court. (Transcript, 29-31.) The petition for removal was verified and was accompanied by a bond sufficient in amount and conditioned according to law. (Transcript, 31-33.) Thereafter, the defendant in error, Albert H. Schwyhart, the plaintiff below, by an answer filed in said cause in the State court, joined issue upon the allegations of fact in the petition for removal with respect to the fraudulent joinder of the resident defendants. (Transcript, 33.) The State Court denied the petition for the removal of said cause to the United States Court, at the same time approving in form and amount the bond submitted therewith; and subsequently the Court of Appeals of Missouri affirmed this ruling. (*Schwyhart v. Barrett, et al.*, 145 Mo. App. 332, 130 S. W. Rep. 388; Transcript, 7.)

SPECIFICATION OF ERRORS.

The Circuit Court of Daviess County, Missouri, and the Kansas City Court of Appeals of the State of Missouri, Erred in Refusing to Order the Removal of the Suit to the United States Court.

BRIEF AND ARGUMENT.

The controversy between the plaintiff and The Chicago, Rock Island and Pacific Railway Company, the removing defendant, was separable.

The Petition failed to Charge any Acts of Negligence Against Either of the Resident Defendants.

At the time the petition for removal was filed, the petition of the plaintiff simple charged that Reed, as train master, ordered the work to be done, and carelessly and negligently failed to give the plaintiff warning thereof. Reed was under no obligation to the plaintiff to advise the plaintiff that the train was to be switched in an unusual manner. *Potter v. New York Central & H. R. R. Co.*, 136 N. Y. 77; *Central Railroad Co. v. Keegan*, 160 U. S. 259, 267. This fact is clearly shown by the language of the Court of Appeals of Missouri in holding that Reed could not be held liable for the plaintiff's injury by proof sustaining these allegations. The court said:

"We say, as a matter of law, that Reed is not shown by the evidence to have been negligent. He was guilty of no breach of duty towards plaintiff. As train master, he was the company's ranking official at the scene and gave the order which, in being executed, resulted in the injury to plaintiff; but he was not required to follow that order through the details of its execution. The order implied direction to those charged with its execution to exercise reasonable care, and it was not incumbent on this general officer to follow in the footsteps of each subordinate to see that he properly performed his duty. Railroads could not be operated if executive officers were duty bound to stop and work out the details of every movement to be executed in the handling of trains. As is well said by the Court of Appeals in *Cullen v. Norton*, 126 N. Y. 1,

26 N. E. 905: 'The manner of the performance of each of the various details of the work by which, as a whole, it is to be conducted, rested necessarily upon the intelligence and care and fidelity of the servants to whom these duties were entrusted.' To the same effect is the decision of our own Supreme Court in *Relyea v. Railway*, 112 Mo., loc. cit. 95, 20 S. W. 481 (18 L. R. A. 817), where it is said: 'It was necessary and proper for the conductor to go to the station, and to give orders as to the movement of the train; but it is out of all reason to say that he was in duty bound to follow up each brakeman and see how each movement was executed. There is in our opinion no evidence to show, or tending to show, that the conductor was guilty of any negligence whatever.'"

Schwyhart v. Barrett, et al., 145 Mo. App. 332, 130 S. W. Rep. 388, 393.

After the petition for removal was filed and overruled, the State Court permitted the plaintiff to amend his petition by inserting the following allegation after the charge that Reed had ordered the work to be done;

"In the unusual manner aforesaid, well knowing that the plaintiff's duties required him to go between the cars, and that unless notified he would only keep watch of the engine of the St. Joseph passenger train." (Transcript, 36.)

The amendment was immaterial at that time.

Likewise no cause of action was stated against the resident defendant, Barrett. It was alleged that Barrett after ordering the plaintiff into a dangerous situation neglected to warn him that the work was to be done in an unusual manner. It was not alleged, at

the time the petition for removal was filed, that Barrett knew or ought to have known of the plaintiff's danger or of the unusual way by which the work was to be done. Without this allegation no cause of action appeared, so far as Barrett is concerned. Without the knowledge of the plaintiff's danger or without the duty to know of it, there was, of necessity, no obligation to communicate the situation to him. After the petition for removal was filed and overruled, the State court permitted the plaintiff to amend his petition, with respect to the defendant Barrett, by inserting the following allegation:

"Although he well knew of plaintiff's danger and the unusual way by which said Pullman car was to be switched." (Transcript, 36.)

This allegation is also immaterial in the consideration of the order denying the removal.

Nor was a cause of action stated against the resident defendant Novak; for, as held by the Missouri Court of Appeals when this case was before that court, proof of the allegations with respect to Novak would not fasten liability upon him. The court said:

"Nor does the evidence accuse Novak of negligence. He acted as the pilot of the freight engine and gave the signal for it to come for the sleeping car. He knew that Barrett and the plaintiff were at work between cars; but Barrett, the foreman of plaintiff, also knew of the order and that the engine would be moved on

Novak's signal. The increased danger to plaintiff consisted, not in making the coupling while he was between the cars, but in making it without warning him, and we think that Novak was entitled to act on the presumption that Barrett had warned plaintiff, and that plaintiff, though between the cars, was expecting an ordinary shock and was prepared to meet it, as was Barrett. It would be unreasonable to say that Novak should have assumed that Barrett might fail to perform his duty towards plaintiff. To so hold would be to announce a rule which, if observed, would greatly interfere with the practical and efficient operation of railroad trains."

No case has gone to the extent of holding that where the specific allegations of negligence, with respect to resident defendants, do not show a cause of action against them, the mere charge that they are liable to the plaintiff will prevent a removal of the suit to the United States Court. District Judge Philips, in pointing out the effect of both the State and Federal law in Missouri in such a situation, said, in *Gustafson v. Chicago, R. I. & P. Ry. Co.*, 128 Fed. Rep. 85, 88, (C. C., W. D. Mo.):

"But the right and the duty of the court are well recognized to examine the petition by its 'four corners' to see if a joint cause of action is stated; for, no matter how designedly and repetitiously the pleader may assert that 'the defendants' did so and so, such assertions will be treated as a mere brutum fulmen, if, taking the facts as a whole stated in the petition, they disclose, in contemplation of law, a separable cause of action against the defendants. As held by the Supreme Court of this state, the allegation of negligence on the

part of the defendants in general terms is treated as mere surplusage—words without meaning—when preceded or followed by specific allegations of specific acts of negligence. *Fuchs v. City of St. Louis*, 167 Mo. 620, 640, 67 S. W. 610, 57 L. R. A. 126; *Chitty v. Railway*, 148 Mo. 64-75, 49 S. W. 863; *McCarty v. Hotel Co.*, 144 Mo. 397, 46 S. W. 172."

Or as District Judge Speer said in *Atlantic Coast Line R. Co. v. Bailey*, 151 Fed. Rep. 891, 894:

"Negligence or liability is not necessarily joint merely because the pleader so charges it in term. The deduction of joint negligence must be based upon specific facts in the petition which justify it."

There being no actionable negligence charged against the resident defendants, the defendant Railway Company was entitled to have the suit removed to the United States Court, as the only controversy was between it and the plaintiff. *Cincinnati, N. O. & T. P. Ry. Co., v. Robertson*, 115 Ky. 858, 74 S. W. Rep, 1061; *Davis, Administrator, v. Chesapeake & O. Ry. Co. et al.*, 116 Ky. 144, 75 S. W. 275; *Slaughter v. Nashville, C. & St. L. Ry. Co. et al.*, (Ky.), 91 S. W. Rep. 744; *Nelson v. Hennessey et al.*, 33 Fed. Rep. 118 (C. C. Minn., Brewer, J.)

By the Express Terms of the Missouri Statute the Several Causes of Action were Improperly Joined.

The cases decided by this Court in which it has been held that there was no separable controversy between the plaintiff and the petitioning defendant are all

actions in which the laws of the state where they were commenced made the particular cause of action against the defendants joint or several at the option of the plaintiff. And it is in this particular that the line of demarcation between the case at bar and those cases is sharply drawn. Whether the allegations of a petition show a joint cause of action against the defendants, and whether there is a separable controversy between the plaintiff and the removing defendant, depends upon the law of the State where the action is commenced. *Enos v. Kentucky Distilleries & Warehouse Co. et al.*, 189 Fed. Rep. 342; *Nicholas v. Chesapeake & O. Ry. Co. et al.*, 195 Fed. Rep. 913, 915; *M'Allister v. Chesapeake & O. Ry. Co. et al.*, 198 Fed. Rep. 660; *Illinois Central R. Co. v. Sheegog*, 215 U. S. 308, 317. By the statute of Missouri, only certain causes of action may be united in a single suit. This statute, Section 598, Revised Statutes of Missouri 1899; Section 1795, Revised Statutes of Missouri 1909, is as follows:

"The plaintiff may unite in the same petition several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of: First, the same transaction or transactions connected with the same subject of action; or, second, contract, express or implied; or, third, injuries, with or without force, to person and property, or either; or, fourth, injuries to

character; or, fifth, claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or, sixth, claims to recover personal property, with or without damages, for the withholding thereof; or, seventh, claims by or against a party in some representative or fiduciary capacity, by virtue of a contract, or by operation of law. But the causes of action so united must all belong to one of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated, with the relief sought for each cause of action, in such manner that they may be intelligently distinguished."

Under this statute, the cause of action against the defendant Railway Company and the cause of action against one or all of the resistent defendants could not be joined in the same petition. It is perhaps true that these several causes of action arise out of an injury to the person of the plaintiff, yet they do not "affect all the parties to the action." The causes of action against one or more of the resident defendants may affect the defendant Railway Company, as through them is may be liable, but in no particular do the several causes of action stated against the defendant Railway Company affect all or any of the resident defendants. The rule is well settled in Missouri, that unless all the counts of a petition affect all of the defendants, there has been a wrongful joinder of parties defendant. *Liney v. Martin*, 29 Mo. 28, 31; *Mertens et al. v. Loenberg*, 69 Mo. 208; *Beattie Manufacturing*

Co. v. Gerardi et al., 166 Mo. 142, 156, 65, S. W. Rep. 1035; *Hunter v. Wethington*, 205 Mo. 284, 103 S. W. Rep. 543; *Gardner v. Robertson*, 208 Mo. 605, 106 S. W. Rep. 645; *Scott v. Taylor*, 231 Mo. 654, 132 S. W. Rep. 1149; *Mann v. Doerr et al.*, 222 Mo. 1, 121 S. W. Rep. 86, 90; *Martinowsky v. City of Hannibal*, 35 Mo. App. 70.

In the case at bar, the petition contained causes of action in which all of the defendants were interested, and causes of action in which only a part of the defendants were interested. Such a proceeding was contrary to the express provisions of the Missouri statute. In *Fernandez v. La Mothe et al*, 147 Mo. App. 644, 127, S. W. Rep. 408, it was held that a petition which contained two causes of action, one against a part of the defendants, and the other against all of them, was demurrable, as it was contrary to the statutory provisions heretofore set forth. The cause of action against the defendant Railway Company being improperly joined with the several causes of action against the resident defendants, under the terms of the Missouri statute, necessarily made the controversy between the plaintiff and the Railway Company, in which the Railway Company was alone interested, separable, and entitled the defendant Railway Company to a removal of the suit to the United States Court.

If at all, the resident defendants were liable to the plaintiff for their personal acts of negligence: The several causes of action against them were actions *ex delicto*. If at all, the cause of action against the defendant Railway Company is dependent upon the contract obligation which the law implies from the relation of master and servant, and is therefore an action *ex cantractu*. The plaintiff has, therefore, sought to joint in the petition actions *ex delicto* with an action *ex contractu*. The Missouri statute under consideration prohibits such a procedure. "It is uniting in the same petition as an action *ex delicto* with an action *ex contractu*, which is not permitted by the statutes." *Southworth v. Lamb*, 82 Mo., 242, 247. Matters of contract and tort are so foreign to each other that they cannot be united in the same petition, even in separate counts, under the statute and decisions of the State of Missouri. *O'Riley v. Diss*, 48 Mo. App. 62, 64; *Sumner v. Rogers*, 90 Mo. 324, 329; *Barnes v. Metropolitan Street Ry. Co.*, 119 Mo. App. 303, 306, 95 S. W. Rep. 971; *Blackmer & Post Pipe Co. v. Mobile & O. R. Co. et al.*, 137 Mo. App. 497, 119 S. W. Rep. 1, 7; *Scott v. Taylor et al.*, 231 Mo. 668, 670, 132 S. W. Rep. 1149, 1154. It must follow, as a matter of course, that a joinder of actions which was not authorized by the laws of Missouri cannot prevent the removal of

the controversy between the plaintiff and the defendant Railway Company.

The Cause of Action, if Any, Against Either or All of the Resident Defendants Arose Under the Common Law; the Cause of Action, if any, Against the Defendant Railway Company was Statutory; and the Causes of Action were, Therefore, Separable.

From the allegations of the petition it is manifest that, at common law, the plaintiff and the three resident defendants were fellow servants. They were engaged in the same general undertaking, and employed to perform duties tending to accomplish the same general purpose. They were employed in a common enterprise. The services of each, in his particular sphere, were directed toward the accomplishment of the same general end. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368; *Northern Pacific R. Co. v. Hambly*, 154 U. S. 349; *Central R. Co. v. Keegan*, 160 U. S. 259; *Northern Pacific R. Co. v. Peterson*, 162 U. S. 346; *Northern Pacific R. Co. v. Charless*, 162 U. S. 359; *Martin v. Atchison, T. & S. F. R. Co.*, 166 U. S. 399; *Northern Pacific R. Co. v. Poirier*, 167 U. S. 48; *Alaska Mining Co. v. Whelan*, 168 U. S. 86; *New England R. Co. v. Conroy*, 175 U. S. 323; *Northern Pacific R. Co. v. Dixon*, 194 U. S. 338; *Texas & Pacific Ry. Co. v. Bourman*, 212 U. S. 536; *Butler v.*

Grand Trunk Ry. Co., 224 U. S. 85. And, at common law, the defendant Railway Company would not have been liable to the plaintiff for the negligent acts of the resident defendants, whether of omission or commission. If at all, the defendant Railway Company was liable to the plaintiff only under the terms and provisions of the following statute of Missouri:

"That every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof: Provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury." (Revised Statutes of Missouri, 1899, Sec. 2878; Revised Statutes of Missouri, 1909, Sec. 5434.)

By the terms of this statute, the defendant Railway Company was alone liable to the plaintiff for the acts of the resident defendants. Following the general policy of the State of Missouri the legislature of that State had not seen fit to hold the employes, committing an act of negligence, liable to their fellow servant injured thereby. This statute was in derogation of the common law, and, in determining the rights acquired under it, must be strictly construed; at least a forced construction cannot be given to it for the purpose of interpolating a meaning into the act not contemplated by the legislature. It would seem to be unnecessary

to resort to construction in order to determine the meaning or extent of this statute; its terms are plain and unambiguous. There is no need of construction. *St. Paul M. & M. Ry. Co. v. Sage*, 71 Fed. Rep. 40, 47; *Webber v. St. Paul City Ry. Co.*, 97 Fed. Rep. 140, 144; *Swartz v. Siegel*, 117 Fed. Rep. 13, 18.

There being no authority under the Missouri Fellow Servant Act for joining an employe who is guilty of the negligence, as a defendant, since the statute created no liability as against individual defendants, a joint cause of action could not be stated under this statute against a railway company and its employes. *Prince v. Illinois Central R. Co. et al.*, 98 Fed. Rep. 1, 2; *Henry v. Illinois Central R. Co.*, 132 Fed. Rep. 715. The following cases clearly illustrate the principle:

In *Chicago, R. I. & P. Ry. Co. v. Stepp, et al.*, 151 Fed. Rep. 908 (C. C., W. D. Mo.), a similar statute of Missouri was under consideration. The statute provided that whenever any person, employe or passenger, should die from an injury occasioned by the negligence of a railway company or any of its employes, "the corporation, individual or individuals" owning or operating such railway company should forfeit and pay a certain sum as compensation for such death. Suit was instituted against the Railway Company and one of its engineers to recover for a death occurring in

Missouri, it being alleged that the death resulted from the negligent manner of running a train in charge of the defendant engineer, and that both defendants were jointly liable to the plaintiff. In holding that the suit was properly removable, District Judge Philips said:

"If this statute does not embrace the engineer in charge of the locomotive, as the servant of the railway company, it is further conceded that there is no joint liability of the company and said Collier, and consequently the case was removable on the petition of the former. This legislation is not revolutionary, but is rather a process of evolution. The corresponding statutes of the state prior to 1899, respecting damages for torts, gave the designated representatives of a deceased employe of a railroad company no right of action against the company for death caused by the fault of a co-employe. The phrase, common to all these statutes, 'Any person,' as employed in the statute, did not include fellow-servants. *Proctor v. Hannibal & St. Joe Railroad Company*, 64 Mo. 112., Rev. St. 1899 (volume 1, p. 729, c. 17 of the damage act), was identical with the antecedent statutes, except that the later statute, after the words, 'any injury is received resulting from or occasioned by any defect or insufficiency,' added the following: 'unskillfulness, negligence, or criminal intent'; and extended the right of action to the adopted children of the deceased.

It must be conceded that these statutes were aimed alone at the master, creating liability on his part for a death caused by his agents, servants, and employes in the operation of the specified public conveyances, for use in transportation; and that the statute, where death resulted from the fault of the servant or employe, was not intended to carry over to the designated representatives of the deceased a right of action against such servant or employe. . .

Statutes in derogation of common-law rules of nonliability are to be strictly construed, and where they create new liabilities they are not to be extended by mere implication. Judge Norton in *Proctor v. Hannibal & St. Joe Railroad Company, supra* (64 Mo. 112), said:

'When particular words or particular clauses of a statute are of doubtful import, they should be considered in connection with the entire statute, and in such cases, when such words or clauses literally construed would produce a conflict in the act or lead to absurd conclusions, they may be restricted or enlarged in their operation, so as to cause each part of it to harmonize with every other part.'

Among the recognized canons of construction of statutes are the following: As an aid thereto, it is always to be presumed that the legislature did not intend to enact a law that would lead to absurd or oppressive results; the intent of the law is the prime object to be kept in view in its construction; if the intent cannot be enforced by the literal import of the words employed, it is well settled that the letter of the statute must occasionally be cut down to conform to its evident spirit and purpose; a construction which must occasion great public or private mischief, and injustice must never be preferred to the one which avoids such results. Resulting from these is the rule that where the words are reasonably susceptible of another construction which would avoid such results, consistent with the manifest purpose or scheme of the legislative enactment, such other construction should be adopted. . . The whole history of such legislation, devolving the right of action on the family or legal representatives of the deceased, and the successive enlargements of such statutes, show that it has been and is the legislative policy and purpose to render the carrier, and not the mere employe, responsible for injuries resulting in death. If it had been the mind of

the legislature to extend such penal statute to the mere employe on the locomotive, car, automobile, or stage driver, it was easy to have said so in plain and apt terms. The courts ought not, by forced or strained construction, to imply such purpose, especially when it would lead to absurd and harsh results.

It is scarcely necessary to add that where the petition on its face, as in this case, and the petition for removal show that the actual relation of the local defendant Collier was that of a mere engineer in the employ of the railroad company, against whom no recovery can be had, under the statute on which the action is predicated, the mere subsequent allegations in the petition that 'the defendants' negligently did so-and-so, is ineffective to prevent the railroad company, a non-resident corporation, from removing the case into this jurisdiction."

Likewise, in *Lockard, et al. v. St. Louis & S. F. R. Co.*, 167 Fed. Rep. 675 (C. C., W. D. Ark.), District Judge Rogers held that under the Arkansas statute (Kirby's Dig. Ark., Sec. 6607; Sandels & Hill's Dig. Ark., Sec. 6207) providing that if death shall be caused by certain negligent acts of a railway employe, "the company owning and operating any such railroad shall be liable and responsible, etc.," an employe could not be joined as a defendant so as to prevent the railway company from removing the suit to the United States Court, saying:

"That section gives a right of action to one who is injured in person or property by the failure of those who are running the train, against the company which owns and operates the railroad, for the failure of those

running the train to keep a lookout, but it does not give any right of action against the persons who are running the train. This statute is in derogation of the common law. No right of action existed at common law for failure to keep a lookout. The common law only held the railroad company liable for an injury to one trespassing upon its track after the trespasser was discovered by those operating the train, and only when they were guilty of negligence in not avoiding the injury. The rule of construction is that where the statute is in derogation of the common law, it shall be strictly construed, and the provisions of this statute should not be construed to give a cause of action against anyone except the railroad company. If it had been the purpose of the legislature to have given a cause of action against the engineer running the train, it would have been an easy matter to have said so. The Legislature did not say so, and therefore it must follow that it did not intend to give the action."

Since the Missouri Fellow Servant Act made the defendant Railway Company alone liable for the alleged negligent omissions of the resident defendants, there could not, so far as that statute was concerned, be a joint cause of action stated against the defendant Railway Company and the resident defendants, and the controversy, under this statute, between the plaintiff and the defendant Railway Company, of necessity, was separable, as it was the only possible controversy which could exist under the explicit terms of the act.

While the resident defendants were charged with acts of omission only, for which, under the law of Missouri, they were not liable to third persons, and

were, therefore, not jointly liable with the defendant Railway Company on account of the result of such omission, yet if it should be assumed, for the purpose of illustration, that one or more of the resident defendants had been charged with acts of misfeasance, for the consequences of which they could be held liable personally, a suit would be presented in which the defendant Railway Company might be liable solely under the explicit terms of the statute, and the resident defendants might be liable solely under the rules of the common law. If such a situation existed, the controversy between the plaintiff and the defendant Railway Company would still be separable. The situation is well illustrated by the decision of the United States Circuit Court of Appeals for the Eighth Circuit, in *Jackson v. Chicago, R. I. & P. Ry. Co.*, 178 Fed. Rep. 432. In that case an employe was killed by the discharge of a shotgun alleged to have been negligently placed and carried upon a hand car, where the deceased was required to perform his duties, by a section foreman. An action was brought against the Railway Company and the section foreman, the latter being a citizen of the same state as the plaintiff, it being alleged that the death of the deceased was due to the joint and concurrent negligence of the defendants. The statute of Nebraska provided:

"That every railway company operating a railway engine, car or train in the State of Nebraska shall be liable to any of its employes who at the time of injury are engaged in construction or repair work, or in the use and operation of any engine, car or train for said company, or, in the case of his death, to his personal representatives for the benefit of his widow and children, if any; if none, then to his parents; if none, then to his next of kin dependent upon him, for all damages which may result from negligence of any of its officers, agents, or employes, or by reason of any defects or insufficiency due to its negligence in its cars, engines, applicances, machinery, track, roadbed, ways or works."

This act, like the Missouri Fellow Servant Act, applied to railway companies alone, and did not attempt to create any liability on the part of the employes for whose negligence the railway company was held responsible. In the Jackson case the Railway Company, if at all, was liable under this statute, while the section foreman was liable, if at all, only by the rules of the common law. On this state of facts, the court held that the Railway Company was entitled to remove the case to the United States Court, as the controversy between it and the plaintiff was necessarily separable. The fundamental difference between an action at common law and a statutory action is well illustrated by the position of this Court in *Union Pacific Ry. Co. v. Wyler*, 158 U. S. 285, where it was held that a cause of action brought under the rules of the common law

would not stop the running of a statute of limitations against a statutory cause of action growing out of the same facts.

The case of *State ex rel Iba v. Moeman*, 231 Mo. 474, 133 S. W. Rep. 38, 43, 44, clearly approves the contention of the plaintiffs in error. In that case suit was commenced against the defendant railroad company and a conductor in its employ to recover damages for the death of plaintiff's intestate, who, it was alleged, was killed through the joint negligence of the two defendants. Section 2864 of the Revised Statutes of Missouri, 1899 (Revised Statutes of Missouri, 1909, Section 5425), provides for liability on the part of railway companies when death is due to certain designated acts of their employes. Sections 2865 and 2866 of the Revised Statutes of Missouri, 1899 (Revised Statutes of Missouri 1909, Sections 5426, 5427), provide for liability in case of death by a wrongful act, both by the master and by the employe responsible for the death. In that case, it was alleged in the petition for removal that the cause of action against the defendant Railway Company was under one statute, and the cause of action against the resident defendant was under the other. In discussing this situation, the Supreme Court of Missouri said:

"Is there in the suit of Mary Iba against this rail-

road company and the individual defendant, the conductor, a separable controversy? In its petition for removal the railroad company says that, if the petition states any cause of action against it, it is under section 2864, Rev. St. 1899, in which the conductor is not involved, and that if there is any cause of action stated against the conductor it is under sections 2865 and 2866, in which the railroad company is not concerned. If that is the correct interpretation of the plaintiff's petition, the cause was removable on the separable controversy theory; otherwise not."

This case finally establishes the law of Missouri that where a suit is brought against one defendant under the exclusive terms of a particular statute, and against another defendant upon a different theory of liability, the controversy between the plaintiff and a non-resident defendant is separable and the cause removable to the United States Court. The case of *Stanley v. Union Depot Ry. Co. et al.*, 114 Mo., 606, 623, 21, S. W. Rep. 832, clearly shows the law of Missouri with respect to joint liability. In that case, suit was brought to recover for the death of a child which was struck and killed by a street-car. It was alleged that the railway company was negligent in the operation of the car, and that the other defendant, a construction company, was negligent, in that it had left the street in a dangerous condition while constructing a sewer. In holding that there was no joint negligence on the part of the defendants, Gantt, P. J. said:

"There is no doubt about the proposition that joint tort feasors are each liable, but, to hold them jointly liable, they should have either acted in concert or the act of one would naturally result in causing the act of the other. Now it cannot be logically or reasonably maintained that the building of this sewer, wall and bridge, as they were on the day of the accident, in any manner, caused the Union Depot Railroad Company to disregard the ordinances of the city as to speed, or in any way relieve its drivers from the duty of keeping their teams under control and a sharp lookout ahead. They were independent agencies; neither had the slightest control over or connection with the other. Their acts as alleged, were separate and distinct."

At the time of the transactions involved in the case at bar, the Supreme Court of Missouri had held that the joinder of a cause of action at common law with one arising under a statute in the same count was improper. *McHugh v. St. Louis Transit Co.*, 190 Mo. 85, 93, 88 S. W. Rep. 853. In that case it was said:

"While there was but one injury and there could be but one recovery for it, and any number of negligent acts preceding the injury and leading up to and contributing to it might properly be set forth in the same count of the petition, if of the same character, an action for damages at common law for negligence cannot be joined in the same count with one for statutory negligence, for the very obvious reason that they could have no possible connection with, or in any way be dependent upon, each other."

Subsequent cases have permitted this to be done, under certain circumstances. These latter cases have been suits by strangers against a master for the com-

mon law and statutory negligence of its employes, it being held that several acts of negligence of the same nature and committed by the same persons, whether the actions arose under the common law or under statute, might be pleaded in one count. In these cases, both causes of action affect all of the parties to the action, as the master was liable both for the common law and the statutory negligence of its employes. Whether in one or two counts, the master was liable for either the common law or statutory negligence of its employes, or for both as might appear from the facts. These cases only serve to magnify the difference in the situation of the case before this Court. Here the defendant Railway Company might be liable under the statute, and the resident defendants, if charged with acts of misfeasance, might be liable at common law; but neither the defendant Railway Company nor the resident defendants could be liable both under the statute and by the common law. The various causes of action commingled in the petition do not affect all of the parties to the action, and with the controversy between the plaintiff and the defendant Railway Company, as to its liability under the Missouri statute, the resident defendants are not concerned, and could not, under the terms of that statute, be made defendants. A suit

might have been brought by the plaintiff against the defendant Railway Company under this statute without the presence of the resident defendants, and this controversy completely adjudicated as between them without the presence of the other parties; in fact, the statute expressly precludes any other situation.

A judgment might be rendered against one and in favor of the other, and judgment on the one cause of action would not be a bar to a suit upon the other, except so far as the question of damages is concerned, and that would not be because the causes of action were joint, but because a party having once obtained damages, in whatever way, for a certain injury, cannot thereafter recover additional damages from another person for the same injuries, irrespective of the fact that he may have a cause of action against the latter person; the reason being, that a party can have but one satisfaction for his injury. By way of illustration, if the resident defendants in the case at bar had seen fit to purchase their freedom from suit from the plaintiff, but not in satisfaction of the injury, and obtained a release, so qualified, it would not have barred an action against the Railway Company.

If, under the laws of Missouri, the defendants were not jointly liable in this action, the suit was removable to the United States Court. *Veariel v. United Engin-*

eering and Foundry Co., 197 Fed. Rep. 877 (D. C., N. D. Ohio). It follows, therefore, that the petition for removal should have been allowed.

By the Petition, the Resident Defendants were Charged Only with Acts of Nonfeasance, for Which, under the Laws of Missouri, they were not Liable to the Plaintiff. The Only Cause of Action, Therefore, set Forth in the Plaintiff's Petition, was a Controversy between the Plaintiff and the Defendant Railway Company.

So far as the resident defendants are concerned, the petition charged that the defendant Reed, after ordering the work to be done in an unusual manner, "carelessly and negligently failed to give the plaintiff any warning or notice whatever." With respect to the defendant Barrett, it was alleged that he ordered the plaintiff to work between the cars, as he was accustomed to do, "without giving to him any warning of danger." With respect to the defendant Novak, it was alleged that he gave the signal for the engine to make the coupling "without in any manner warning the plaintiff of his dangerous situation, as it was his duty to do." The charges against the resident defendant were recapitulated, as follows:

"That the defendants, and that the officers, agents and servants of the defendant Railway Company as

well, carelessly and negligently failed and neglected to warn plaintiff of his dangerous situation." (Transcript, 25, 26.)

From these allegations of negligence it will be seen that the resident defendants were charged only with neglecting to perform duties, which it is alleged it was their duty to do; they were charged with acts of omission or nonfeasance only. For such failure, the resident defendants, while they may have been liable to the defendant Railway Company, were not liable to third persons for the consequences of such neglect. *Feltus v. Swan*, 62 Miss. 415; *Murray v. Usher*, 117 N. Y. 542; *Bell v. Catesby*, Roel. Abr. 78, pl. 20; *Marsh and Astrey's Case*, 1 Leon. 146; *Cameron v. Reynolds*, 1 Comp. 403; *Blackstock v. New York & E. R. Co.*, 20 N. Y. 48, 51; *Scheller v. Silbermintz*, 98 N. Y. Supp. 230; *Horner v. Lawrence*, 37 N. J. L. 46; *Prince v. Illinois Central R. Co.*, 98 Fed. Rep. 1, 3; *Lane v. Cotton*, 12 Mod. 488; *Henshaw v. Noble, et al.*, 7 Ohio State 226, 232; Ewell's Evans on Agency, page 438; Wharton's Commentaries on Agency and Agents, Section 535; Mechem on Agency, Section 539; Story on Agency, 9th Edition, Sections 308, 309; 43 Am. & Eng. R. Cas. N. S. 457, 459 (note).

The rule of these authorities was followed by the Supreme Court of Missouri in the case of *Harriman*

et al. v. Stowe, 57 Mo., 93, 98, and in establishing the rule which has since been followed in all cases within that State of a character similar to the one before this Court, that court said:

"The agent is personally liable to third persons, for his own mis-feasances and positive wrongs, but he is not in general liable to third persons for his own nonfeasances or omissions of duty, in the course of his employment. His liability in these latter cases, is solely to his principal, there being no privity between him and such third persons; and the privity exists only between him and his principal. Therefore, the general maxim as to all such negligences and omissions of duty is, in cases of private agency, *respondeat superior*, (Story on Agency, Sec. 308) and such is the general doctrine."

This rule was subsequently affirmed by the Supreme Court of Missouri in *Steinhauser v. Spraul*, 127 Mo. 541, 555, 560, 28 S. W. Rep. 623. The syllabus of that cause is as follows:

"A servant who, by negligence in the discharge of his duties, injures a third person, is not personally liable to such third person. In such case the maxim *respondeat superior* obtains, the principle is liable for the injury and the agent is then liable to the principal for damages which the latter may have sustained."

And, after discussing the leading cases upon the question, Mr. Justice SHERWOOD said:

"These cases all go to point out the essential difference which exists between 'acts of direct and positive wrong' which are misfeasances, and render the agent personally liable, and 'mere neglects' or nonfeasances

29

in which the liability is cast alone on the principal or master."

The law within the State of Missouri is that where a servant acts as a master's representative he is not responsible for injuries to his fellow servant resulting from his negligence, unless those injuries are positive physical wrongs for which he would be legally liable were he acting without, instead of with, orders of the master.

And in the recent case of *Jewell v. Kansas City Bolt & Nut Co.*, 231 Mo. 176, 132 S. W. Rep. 703, 711, the Supreme Court of Missouri again reaffirmed the rule. In that case it was insisted by a foreman who had been made a defendant with his employer in an action to recover for personal injuries, that the action of the trial court in giving the peremptory instruction in his behalf was proper, even though it should be conceded that such action was erroneous in so far as it related to his employer, and for that reason the subsequent action of the trial court in granting a new trial as to him was erroneous. In discussing this question the court said:

"This insistence is predicated upon the contention that he was an employe and foreman of the appellant company, having had charge of the milling department, and that the evidence fails to show that he was guilty of any positive wrong or malfeasance toward respondent. If that contention is true, then clearly Sturgus

would not be liable to respondent, for the law is well settled in this state that the foreman is not liable in damages for personal injuries sustained by a servant of the master in consequence of the foreman's nonfeasance or mere neglect of duty."

The fact that the three resident defendants in the case at bar were charged with acts of nonfeasance only, made recovery against them under the laws of Missouri impossible, and entitled the Railway Company to a removal, as it was the only defendant interested in the result of the suit, and was, therefore, the only indispensable party.

In *Kelly v. Chicago & Alton R. Co. et al.*, 122 Fed. Rep. 286, 289-290, (C. C., W. D. Mo.) an action was commenced in the state of Missouri against a foreign railway company and one of its resident employes. The petition charged that the resident defendant was employed to inspect engines before they were allowed to go out of the yards of the railway company and that he had failed to perform this duty, which omission was alleged to be the cause of the plaintiff's injuries. The case was removed to the Federal Court, and in denying a motion to remand, the decision being based on the law of Missouri with respect to the liability of a servant for an act of nonfeasance, District Judge Philips said:

"Under the allegations of this petition Strause was

a mere servant of the railway company, charged with the duty of inspecting the engines of the company before they were suffered to go out of the defendant's yards at Slater, Mo. His failure to do this was simply an act of omission or nonfeasance, and nothing more. I understand the law to be that the agent or servant is personally liable to third persons for doing something—committing a positive act—which he ought not to have done, but not for not doing something which he ought to have done. In the latter case he is liable only to his employer. (Citing authorities.) Had the defendant Strause, the servant of the defendant Chicago & Alton Railway Company, done some positive act, amounting to a misfeasance, which contributed to the injury, a joint action might have been lodged against him and the railway company, but this is not the case presented by the petition. So, under the suit pending at the time the defendant railway company was summoned as a party defendant, no joint cause of action was pending against it and the defendant Strause, and the suit was clearly removable as to it."

In *Davenport v. Southern Ry. Co. et al.*, 124 Fed. Rep. 988, an action was commenced against the railway company and certain of its resident employes, and in holding that the case was removable to the Federal Court on the ground that there could be no joint liability, Circuit Judge Simonton said:

"The Southern Railway Company is responsible to third persons for the negligence of its agents, but for negligence merely these agents are not responsible to third persons. . . Negligence is negative in its character. It is the omission to perform some duty. . . It implies nonfeasance, and is contradistinguished from misfeasance. To make the agent responsible to third

persons, there must be some positive act or wrong on his part."

The Circuit Court of Appeals of the Fourth Circuit, in *Davenport v. Southern Ry. Co., et al.*, 135 Fed. Rep. 960, by a divided court held that this case should have been remanded, but on the ground that the acts of negligence charged against resident defendants were acts of misfeasance for which they were personally liable to third persons.

In *Bryce v. Southern Ry. Co. et al.*, 125 Fed. Rep. 958, (C. C., D. S. C.) an action was commenced by a passenger against the railway company and two of its employes to recover for personal injuries alleged to have been caused by the joint negligence of all of the defendants. It was not alleged wherein the employes were negligent. The case was removed to the Federal Court, and in denying a motion to remand, Circuit Judge Simonton held that since no specific charge of negligence was made against the employe defendants, no cause of action was stated against them, and the action was therefore properly removed, as the mere allegation of joint negligence was meaningless so far as the employe was concerned. It was held that the allegation of specific facts upon which the claim of negligence was based was necessary in order to determine whether the alleged negligence was the con-

mission of an act they should not have done or the omission of an act they should have done, as only in the former case could the employes themselves be liable.

In *Shaffer v. Union Brick Co. et al.*, 128 Fed. Rep. 97, 100, (C. C., D. Kan.) District Judge Pollock, under circumstances similar to those in the present case, held that the action was removable to the Federal Court as there could not, of necessity, be a joint cause of action against the Brick Company and its resident employes, who were charged with acts of nonfeasance only, saying:

"In common parlance, it is said the negligence of the servant occurring in the discharge of his master's business, to the injury of another, is the negligence of the master. This statement for practical purposes, is true, but it is inaccurate. For such negligence of the servant the master is legally liable, but such liability may rest either on grounds of public policy, or upon the ground that the master is liable for his own wrong-doing. The servant may or may not be liable, depending upon the nature of the act performed. For example a servant may wholly fail to perform any of the duties imposed upon him by the master. Injury resulting to a third person from such failure, the master will be responsible to the injured person. The servant will not be liable to such third person, but to the master only. In such case there is no joint liability, because the master alone is liable.

In *Floyt v. Shenango Furnace Co. et al.*, 126 Fed. Rep. 539, 540, (C. C., D. Minn.) an action was com-

menced by an employe of the furnace company against that company and an employe, who was a citizen of the same state as plaintiff. In denying a motion to remand the case to the State court, District Judge Amidon said:

"The only negligence charged against him is simply nonfeasance, in that he failed to perform the positive duty of the master to properly inspect and repair the ladderway. Upon well-established principles of the common law, Hogdon was not liable to third parties or coemployes for nonfeasance. For that he is liable only to his employer."

The case of *McGinnis v. Chicago, R. I. & P. Ry. Co.*, 200 Mo. 347, 98 S. W. Rep. 590, 592, clearly illustrates the rule of liability in Missouri, and likewise shows that the present case should have been removed to the Federal Court. In discussing the question now under consideration, Judge Graves said:

"From the negligence pleaded and the proof made, the Railroad Company, if liable at all, is liable upon the principle of *respondeat superior*. There are two classes of cases falling under this doctrine, one wherein the master is held liable for the nonfeasance or negligent failure of the servant to perform a duty, and the other where the master is held liable for the misfeasance, or negligent performance of a duty. In the one case the servant simply negligently fails to do what should have been done, and in the other he negligently does what should have been done and properly done. In the first class of cases the servant is not liable to third parties, but the master under the rule of *respondeat superior* is liable. In the second class both

are liable to third parties; the servant because he actually does the wrongful act occasioning the injury, the master because under the rule of *respondeat superior*, he is liable for the negligent act of the agent done within the scope of his employment, and in the course and performance of his master's business. In either case the master has recourse upon the servant as for breach of duty to the master. The case at bar is one for misfeasance, or one of the second class as above classified. Counsel for plaintiff *evidently so understood it, or there would have been no joinder of the servant.* (The italics are ours.) But whether he did so understand and so act is immaterial, for the evidence so shows."

In the recent case of *Clark v. Chicago, R. I. & P. Ry. Co.*, 194 Fed. Rep. 505, 514, (D. C., W. D. Mo.) in speaking of the law of Missouri in both the State and Federal Courts upon this subject, District Judge Van Valkenburgh said:

"The rule in this state undoubtedly is that a foreman is not liable in damages for personal injuries sustained by a servant of the master in consequence of the foreman's nonfeasance or mere neglect of duty. . .

Where the servant acts as the master's representative, he is not responsible for injuries to his fellow servant resulting from his negligence, unless those injuries are either directly or in effect positive physical wrongs, for which he would be legally liable were he acting without, instead of with, orders."

This distinction is recognised by this Court in *Southern Railway Co. v. Miller*, 217 U. S. 209,215.

In the case at bar, it being apparent that the resident defendants were charged solely with acts of omis-

sion or nonfeasance, the only proper party defendant was the Railway Company. When the petition for removal was filed, the petition of the plaintiff, so far as the resident defendants were concerned, charged only that they failed to perform the positive duty of the master to advise the plaintiff of the unusual way in which the work was to be done. Under the law of Missouri, and under the universal rule, there was but one controversy in the plaintiff's petition, and that was between the plaintiff and the defendant Railway Company, and upon the petition of that defendant the suit was properly removable to the United States Court. The fact alone that citizens of the same state as the plaintiff were made defendants will not prevent a removal. Liability is not necessarily joint merely because the pleader sees fit to sue two or more parties in the same action. The deduction of joint negligence must be based upon specific facts in the petition which justify it. *Chicago, R. I. & P. Ry. Co. v. Gustafson*, 128 Fed. Rep. 85 (C. C., W. D. Mo.); *Chicago, R. I. & P. Ry. Co. v. Stepp*, 151 Fed. Rep. 908, 914 (C. C., W. D. Mo.) In *American Bridge Co. v. Hunt*, 180 Fed. Rep. 302, 305, Mr. Justice LURTON, in writing to the opinio nof the court for the Circuit Court of Appeals for the Sixth Circuit, said:

"It must be conceded that if, upon a fair and reason-

able construction of the averments of the petition, no facts are averred which, as matter of law, if proven, would constitute actionable negligence against Guthrie, his joinder as a defendant with the corporation will not prevent a removal. Concurring negligence of master and servant is essential to the right of joint action, and it is clear that, if no negligence of any character is averred against the servant, concurrent negligence is not charged."

The defendant Railway Company, between which and the plaintiff the only controversy in the suit existed, had a clear right to have the action removed to the United States Court.

The Decisions of This Court in Cases Construing the Provisions of the Removal Act, Do Not Establish Rules Contrary to the Contentions of the Plaintiffs in Error.

The cases decided by this Court in which it has been held that a separable controversy, within the meaning of the Act of Congress, did not exist, are, without exception, suits where the plaintiff having the option to bring a joint or several action, exercised the privilege and alleged facts in the petition which, if true, showed a joint cause of action against all of the defendants. In *Louisville & N. R. Co. v. Ide*, 114 U. S. 52; *Pirie, et al. v. Tvedt, et al.*; 115 U. S. 41; *Sloane, et al. v. Anderson*, 117 U. S. 275; *Stone v. South Carolina*, 117 U. S. 430; *Plymouth Gold Mining Co. v. Amador Canal Co.*, 118 U. S. 264; *Little, et al. v. Giles, et al.*,

118 U. S. 596; *East Tennessee, V. & G. R. Co. v. Gray*, 119 U. S. 240; *Torrence v. Shedd*, 124 U. S. 527; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599; *Whitcomb v. Smithson*, 175 U. S. 635; and *Chicago, R. I. & P. Ry. Co. v. Martin*, 178 U. S. 245, the allegations of the respective petitions showed that all of the defendants jointly and concurrently participated in the only act of which complaint was made. The respective plaintiffs in these suits, as a matter of course, had the option of suing the defendants jointly or severally, and having chosen to sue the defendants jointly, the cause of action which the plaintiff insisted was joint, and which was joint, if the allegations of the petition were true, could not be made separable at the option of any one of the defendants. (Appendix, pages 75 to 82.)

In *Powers v. Chesapeake & O. Ry. Co.*, 169 U. S. 92, while the question was not for decision, yet this Court took occasion to lay down a rule, necessarily fundamental, to the effect that an action of tort which might have been brought against many persons or against any one or more of them, and which is brought in a State court against all jointly, contains no separate controversy sufficient to authorize its removal by some one of the defendants. (Appendix, page 83.)

Powers v. Chesapeake & O. Ry. Co., 169 U. S. 92;

Chesapeake & O. Ry. Co. v. Dixon, 179 U. S. 131; *Cincinnati, N. O. & T. P. Ry. Co. v. Bohon*, 200 U. S. 221; *Southern Railway Co. v. Carson*, 194 U. S. 136; *Illinois Central R. Co. v. Sheegog*, 215 U. S. 308; *Southern Railway Co. v. Miller*, 217 U. S. 209; and *Chicago, B. & Q. R. Co. v. Willard*, 220 U. S. 413, were suits in which the laws of the State where the respective cases were commenced made the respective causes of action set forth in the petition joint or several at the option of the plaintiff. In each of these cases the statutes and laws of the State where they were commenced made the various defendants jointly liable for the causes of action set forth in the petition. Under such circumstances, it is manifest that a single defendant could not, by any allegations in a petition for removal, make separable a cause of action which the statutes of the State made joint. (Appendix, pages 84 to 101.)

The case of *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206, to which reference is so frequently made, is not an authority sustaining the contention that the case at bar was not removable upon the petition of the defendant Railway Company. The decision in that case, being an answer to a certified question, was that a joint action brought against a railway company and its servants for the purpose of holding the railway company liable for the negligent

acts of the servants who were made defendants, could not be made separable at the option of the defendant railway company. It is well settled that an action which a plaintiff seeks to make joint cannot be made separable by one of the defendants jointly sued, but this presupposes the fact that the plaintiff has filed a petition alleging a joint cause of action against the defendants. The question certified in the Thompson case clearly recognizes this fundamental proposition. In the case at bar, the plaintiff did not attempt to bring a joint action against the defendants but simply embodied several causes of action against the respective defendants in a single suit. Throughout the petition there is an entire want of an allegation that the defendants were either jointly or concurrently negligent, or that their several acts concurrently contributed to the accident. When the petition was filed, it was certainly not the mind of the pleader to charge acts of joint or concurrent negligence against all of the defendants. The Missouri statute permitted a pleader, under certain circumstances, to unite several causes of action in one petition, and in this single suit litigate those several causes of action, but this did not make such causes of action joint. The pleader in the case at bar evidently attempted to follow this procedure, and the fact that he misconceived the extent of the statutory author-

ity does not make the cause of action joint. His apparent intention was only to unite in one petition and litigate in one suit several distinct causes of action. All that the petition does is to set out distinct causes of action and ask for recovery thereon. And while it may be true, as announced by this Court, that a court cannot say that a cause of action is separable which the plaintiff by his petition has sought to make joint; neither is it within the power of a court to declare that a cause of action is joint when the pleader has not attempted to do so, and, particularly, when, as here, the statute of the State where the action is commenced does not authorize him to do so. This Court, in narrowing the decision in the Thompson case, said:

"In the present case there is nothing in the question propounded which suggests an attempt to commit a fraud upon the jurisdiction of the Federal courts. . . . In good faith, so far as appears in the record, the plaintiff sought the determination of his rights in the State court by the filing of a declaration in which he alleged a joint cause of action."

These prerequisites are not found in the case at bar, and the foregoing language takes this action without the rule of the Thompson case. That case was based upon the fact that the cause of action was what the plaintiff in good faith said it was. This was necessarily so, as the certified question was so limited, and this Court was careful to call attention to the fact

that the decision was made without reference to any State statute, "as the effect is not guaranteed by the questions propounded." The question certified presupposes the statement of a joint action against all of the defendants, for their joint and concurrent negligence, and was not only made in good faith, but under circumstances giving the plaintiff the choice of an action against any one of several joint tort feasors, or a joint action against all. In this light, neither the question certified, nor the answer thereto, was applicable to the case at bar. In the discussion of the Thompson case, it is interesting to recall, that, by the express provisions of the statutes of Tennessee, where the action was commenced, a railway company and its employee are both made jointly liable for damages resulting from death or injury due to the negligence of the employee. (Shannon's Annot. Code of Tenn., 1905, Sections 1971-1972, 4025-4026, 4028-4029.)

In no case has it been held by this Court that a suit was not removable, where no cause of action was stated against the resident defendants. Neither has the right to a removal been denied by this Court in any case where the joinder was not expressly authorized by either the constitution or the statutes of the State where the suit was begun. In short, the decisions of this Court have gone only to the extent of holding that

where an action is commenced against several defendants, who, by the laws of the State where the suit is begun, are either jointly or severally liable to the plaintiff, at his option, a non-resident defendant has no right to say that an action which the plaintiff has sought to make joint, and which the laws of the State where the suit is commenced permit him to make joint, at his option, shall be separable. The case at bar presents an altogether different situation. No cause of action was stated against the resident defendants; their joinder with the non-resident defendant was not permitted by the laws of Missouri; and the pleader as a matter of fact did not seek to recover against the defendants on account of their joint or concurrent negligence.

The Thompson case has been followed by the Supreme Court of Missouri in three cases, and it was by reason of those cases that the petition for removal in the case at bar was denied. In *Lanning v. Chicago Great Western Ry. Co. et al.*, 196 Mo. 647, 657, 94 S. W. Rep. 491, suit was brought by an employe against a railway company and its engineer, who, like the plaintiff, was a citizen of Missouri, to recover for an injury alleged to have been caused by the positive negligence of the resident defendant. In holding that the suit was not removable, the court said:

"In our opinion the recent decisions of the Supreme Court of the United States in the cases of *Railroad v. Thompson*, 26 Sup. Ct. Rep. 161, and *Railroad v. Bohon, Admr.*, 26 Sup. Ct. Rep. 166, have foreclosed further discussion of this question on our part. This being purely a federal question, the judgment of the Supreme Court of the United States must be accepted as final."

A casual examination of the Bohon case demonstrates how inapplicable it was to the situation before the Supreme Court of Missouri. The cause of action sued on in the Bohon case was made joint by the statute and constitution of the State where it arose and where the suit was commenced. An action made joint by express law cannot, naturally, be made separable at the will of one of the joint tort feasors. The Thompson case did hold that, under proper allegations, a master and a servant might be sued jointly for the negligence of the servant. But, as has been pointed out, it presupposed that the master and servant were properly and sufficiently charged with having jointly and concurrently caused the injury, and that they were sought to be held jointly liable therefor. The Thompson case may or may not have been applicable to the Lanning case, depending upon the allegation of the petition, but it is manifest that neither the Thompson case nor the Lanning case is an authority in point in the consideration of the case at bar, as in those

cause of action was stated against the resident defendant, while here, the contrary is true. The Haben and Thompson cases are controlling upon all inferior courts, but only in cases similar in fact or principle, and to which they are applicable.

In *Stotler v. Chicago & Alton Ry. Co. et al.*, 200 Mo. 197, 119, 98 S. W. Rep. 509, suit was brought to recover damages for an injury sustained by a traveler at a public crossing due to the positive negligence of the employes of the railway company. The railway company and the two employes, citizens of the same State as the plaintiff, charged with having negligently operated the train, were made defendants. The Supreme Court of Missouri held that the suit was not removable upon the petition of the non-resident railway company, on the ground that owing to the decisions of this Court a "further discussion of this question was foreclosed." The distinction between the Stotler case and the one before this Court is apparent. In that case, both the railway company and its employes were liable, at common law, to the plaintiff for a single negligent act, while here the defendant Railway Company was liable, if at all, by the terms of a statute which excluded a recovery against the resident defendants; the resident defendants, under the allegations of the petition, were not liable at all,

and if charged with acts of negligence for which they might be held liable to the plaintiff, it would be only under the rules of the common law. Under any possible allegations in the case at bar, the theory of recovery against one set of defendants precluded a consideration of recovery against the other defendant. Under such circumstances, the respective causes of action could not be otherwise than distinct, nor could the controversy between the plaintiff and the defendant Railway Company be otherwise than separable.

In *Johnson v. St. Joseph Terminal Ry. Co. et al.*, 208 Mo. 381, 101 S. W. Rep. 641, suit was brought to recover for the death of an employe, against a non-resident railway company, the lessee and operating road, and a domestic railway corporation, the lessor. The act of negligence which was responsible for the death of the employe was that of the non-resident railway company. The statute of Missouri applicable to such a situation provides that when the road of a domestic railway company is leased:

"The company or corporation so leasing its road, or such part thereof, to such other company or corporation, or so licensing or permitting the use of its road or track by such other company or corporation, shall remain liable for all acts, debts, claims, demands, judgments and liabilities of the lessee or licensee, or any sublessee or sublicensee, company or corporation, the same as if it (the lessor or licensor) operated the

road, or such part thereof, itself; and such lessee or licensee shall likewise be held liable and may sue and be sued in all cases and for the same causes, and in the same manner, as if operating its own road: Provided, however, that a satisfaction in full of any claim or judgment by either of such corporation or company, shall discharge the other. And suit may be brought upon any such claim, debt, lien or liability against either the corporation to whom any such sale, transfer, lease, or assignment has been made, or with which such consolidation has been had, or against the corporation so selling, transferring, leasing, consolidating or assigning, or against both such corporations, jointly, at the option of such claimant." (Revised Statutes of Missouri 1909, Section 3079.)

Under such circumstances, the controversy between the plaintiff and the non-resident railway company could not be separable, as the statute of Missouri had made the action joint or several at the option of the plaintiff. This case was not within the rule of the Thompson case, but was decided upon the principle applied in the Sheegog and Willard cases, *supra*, with which the case now under consideration has no concern.

No one of the foregoing cases considered by the Supreme Court of Missouri is similar or analogous to the case at bar in either fact or principle. And the Kansas City Court of Appeals of the State of Missouri, in holding that this case was not removable upon the authority of the cases, misconceived the fundamental

distinction between them and the facts, with their accompanying legal principles, by which the decision of this case must be controlled.

The Facts Alleged in the Petition for Removal Created a Controversy which the State Court was Without Power to Determine.

In the petition for removal, it was alleged that the petition of the plaintiff did not state a cause of action against the resident defendants; that a joint cause of action was not and could not be stated against the defendant Railway Company and the resident defendants under the statutes of Missouri; and that the plaintiff had no cause of action whatever against any of the resident defendants, nor did he have any reasonable ground upon which to base a cause of action against any of the resident defendants. And it was further alleged that the resident defendants were joined for the sole and fraudulent purpose of preventing the defendant Railway Company from removing the case to the United States Court. (Transcript, 30-31.) Upon these allegations of fact, the defendant joined issue (Transcript, 33), and this controversy was decided, by the State Court, against the defendant Railway Company. In speaking of this controversy, the Court of Appeals of Missouri, in this case, said:

"We think the petition, rightly construed, does plead the specific facts from which the pleader draws the

conclusion that the joinder was fraudulent, but that the facts pleaded do not reasonably support the conclusion the pleader would draw from them."

Schweyhart v. Barrett, et al., 145 Mo. App. 332, 130 S. W. Rep. 388, 392.

Whether or not the facts pleaded were sufficient to support the conclusion of fraud, was a question with which the State court was not concerned; it was exclusively a matter for the Federal Court to determine. All questions of fact must be heard and determined by the United States Court, and, therefore, must be taken as true by the State court when a petition for removal is presented. *Stone v. South Carolina*, 117 U. S. 430, 433; *Carson v. Hyatt*, 118 U. S. 279; *Burlington, C. R. & N. Ry. Co. v. Dunn*, 122 U. S. 513, 515; *Crehore v. Ohio & Mississippi Ry. Co.*, 131 U. S. 240; *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298; *Kansas City Suburban Belt Ry. Co. v. Herman*, 187 U. S. 63, 70; *Muldowney Traction Co. v. Mining Co.*, 196 U. S. 239; *Chesapeake & O. Ry. Co. v. McCabe*, 213 U. S. 207; *Texas & Pacific Ry. Co. v. Bustin*, 214 U. S. 153.

In the case of *Illinois Central R. Co. v. Sheegog*, 215 U. S. 308, 315, Mr. Justice Holmes said:

"And further, there is no doubt that the allegations of fact, so far as material, in a petition to remove, if

controverted, must be tried in the court of the United States, and therefore must be taken to be true when they fall to be considered in the State courts."

In the case at bar it was impossible to make a more detailed statement, in the petition for removal, of the fraudulent acts committed by the plaintiff, by which he sought to deprive the defendant Railway Company of the right to remove the cause. No facts were alleged in the petition of the plaintiff which were sufficient to show a cause of action against either of the resident defendants. And the defendant Railway Company could not do more than charge that their joinder under such circumstances was solely for the fraudulent purpose of preventing the defendant Railway Company from exercising its right of removing the suit to the United States Court. These allegations of fact, in which the State court recognized a controversy relating to the fraudulent joinder of the resident defendants, entitled the defendant Railway Company to have the case removed to the Federal Court for, at least, a determination of this controversy. While a plaintiff, in good faith, may proceed in a State court upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where the right exists, and should be equally vigilant to protect the right to proceed in the Federal

court as to permit the State court, in proper cases, to retain their own jurisdiction. *Wecker v. National Enameling and Stamping Co.*, 204 U. S. 176; *Illinois Central R. Co. v. Sheegog, supra.*

Aside from the Allegations of Negligence with Respect to the Conduct of the Resident Defendants, There was a Separable Controversy Between the Plaintiff and the Defendant Railway Company.

The charge of negligence against the three resident defendants was that they, in their several capacities and at different times, carelessly and negligently failed and neglected to warn the plaintiff of the fact that the manner of switching the train was to be done in an unusual manner. There was a further and distinct charge of negligence against other employes with respect to the way the freight engine was handled in performing the work. This charge was as follows:

"That the said freight engine was a very large and heavy engine, and was backed and pushed against said passenger train, negligently and with great force and violence, so that the slack between the cars where the plaintiff was at work was entirely taken up, and the cars were removed violently and suddenly, and without notice to the plaintiff and without any opportunity on his part to escape from danger." (Transcript, 25.)

The negligence relied upon for recovery is then recapitulated as follows:

"That said work was negligently and carelessly performed and that the defendants and the officers, agents

and servants of the defendant railway company as well carelessly and negligently failed and neglected to warn plaintiff of his dangerous situation and all of the defendants failed in their duty toward the plaintiff and that by reason of such negligence and carelessness of the defendants and all of them, the plaintiff was caught and with his head between the cars aforesaid, each of the said cars coming in violent contact with his head, so that he was greatly and dangerously and permanently wounded and injured by the carelessness and negligence of the defendants as aforesaid, so that by reason of the negligent and careless acts aforesaid his skull was fractured, etc." (Transcript, 26.)

(The italicised word "and" was, by oversight, omitted from the original abstract in the State court and therefore from the Transcript of the Record, but was inserted in the original petition, as shown by a certified copy thereof, herewith transmitted.)

It is manifest, therefore, that the plaintiff sought to recover from the defendant Railway Company, not only for the alleged respective acts of omission on the part of the resident defendants, but as well for the alleged negligent and careless acts of other employes in handling the engine. In fact, from the allegations of the petition as a whole, it is apparent that the alleged negligence of these other employes was the proximate cause of the accident; if the engine had been properly handled, the accident could not have occurred. If it be conceded, for the purpose of argument, that the petition showed on its face such charges of joint

negligence concurred in, as a matter of law, by the defendant Railway Company and the three resident defendants, as authorized the State court to deny a removal, on account of such allegations; nevertheless, the controversy between the plaintiff and the Railway Company, with respect to the distinct allegations of negligence on the part of the other employes, in carelessly and negligently moving the engine and making the coupling, was plainly separable, and the case was removable under the terms of the second section of the Removal Act. That portion of the Act, which is pertinent, reads as follows:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district." (25 Stat. 434; U. S. Comp. Stat. 1901, p. 507.)

By the express provision of this statute, it is recognized that in any suit there may be several causes of action, some of which may not be removable, but if in any one of them there is a controversy which is entirely between citizens of different states and which can be fully determined between them, then the defendant actually interested in such controversy may remove the suit to the Federal Court for the proper

district, if the amount in controversy is sufficient. Following the provisions of the statute, the petition for removal alleged that there was a separable controversy between the plaintiff and the Railway Company, which could be fully determined between them, and the whole subject-matter finally adjudicated and complete relief afforded, as to such separate controversy, without the presence of the other defendants. In the controversy between the plaintiff and the Railway Company as to whether the latter was liable to the former for the alleged acts of negligence of the employes in charge of the engine, in carelessly and negligently operating the same, by reason of which the cars between which the plaintiff was at work were negligently pushed together and the plaintiff injured, the three resident defendants were not and could not be interested. The controversy between the plaintiff and the Railway Company and the three resident defendants as to the liability of all or any of the defendants for the alleged omissions of the resident defendants was a thing apart. The petition raised three distinct issues: (1) The question of the liability of the resident defendants for their alleged acts of omission; (2) the question of the liability of the Railway Company for the alleged negligence of the resident defendants; (3) and the separate question of the liability

of the Railway Company for the alleged negligence of other employes of the Railway Company, in the performance of acts in no way connected with the alleged omissions of the resident defendants. The controversy as to the liability of the Railway Company for the third cause of action is on distinct grounds, with which the three resident defendants could not, by any process of reasoning, be interested. A separate suit might have been brought on the latter cause and this separate controversy settled, as between the plaintiff and the Railway Company, without the presence of either of the resident defendants; in fact, in such a controversy, neither of them could have been made a party. The liability of the Railway Company to the plaintiff for the alleged careless and negligent manner in which the engine was moved, which resulted in the cars being violently pushed together, could have been determined under this petition only by a consideration of the latter cause of action, and this separate controversy must, of necessity, be settled in this court, to the exclusion of the other allegations of negligence and of the resident defendants. The very terms of the statute provide for such a situation, and anticipate that in any suit there may be several and different controversies, any one of which, if "wholly between citizens of different States, and which can be fully determined as

between them," may be removed to the United States Court by any defendant actually interested in such controversy. And the removal of any such separable controversy to the United States Court takes the entire case there for final disposition.

In the early case of *Fraser v. Jennison*, 106 U. S. 191, 194, Mr. Chief Justice Waite held that the test of removability, under such circumstances, was as follows:

"To entitle a party to a removal under the second clause of the second section of the act, there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other."

Later in the opinion, he said:

". . . the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been kept."

In *Barney v. Latham*, 103 U. S. 205, 214, a suit was brought by plaintiffs, citizens of Minnesota and Indiana, respectively, against defendants, citizens of other States, and a Minnesota corporation. It was claimed that the State of Minnesota resolved from

Congress certain lands in aid in the construction of railroads within that State, and that the benefit of the grant was transferred by that State to a certain railroad company, with authority to construct a line of road within that State. It also appeared that the individual defendants had constructed a portion of the proposed railroad for the aforesaid railroad company, and had thereby become entitled to a certain amount of the land received from Congress, which the railroad company agreed, in consideration of its indebtedness to those persons, to convey to them. It was alleged that the predecessor of the plaintiffs contributed one thirty-seventh of the money used in the construction of the road, and to that extent they were entitled, in equity, to a proportionate undivided share of the lands earned. The individual defendants incorporated themselves under the general laws of the State of Minnesota as the Winona and St. Peter Land Company, to which, by their direction, the said railroad company conveyed the lands which were earned by the construction of the road. This land company was the resident defendant. The specific relief asked for was that the individual defendants be required to account to the plaintiffs for money which came to their hands from the sales of certain of the lands; that the plaintiffs be adjudged the owner of a certain propor-

list of the unpaid contracts and securities in the hands of the land company; that the land company be required to account to the plaintiff for all lands sold by it subsequently to the conveyance from the said railroad company; and that the land company be required to convey to them a certain proportion of all the unsold lands. The individual defendants, being non-residents of the State, asked for a removal to the Federal Court, on the ground that the controversy between the plaintiffs and them was separable under the Act of March 3, 1875, which contained a provision identical with that now under consideration. In holding that there was a separable controversy, and that the suit was removable to the United States Court, Mr. Justice HARLAN said:

"The complaint, beyond question, discloses more than one controversy in the suit. There is a controversy between the plaintiffs and the Winona and St. Peter Land Company, to the full determination of which the other defendants are not, in any legal sense, indispensable parties, although, as stockholders in the company, they may have an interest in its ultimate disposition. Against the latter, as a corporation, a decree is asked requiring it to convey to the plaintiffs the undivided two-ninths of one thirty-seventh of certain lands, and to account for the proceeds of the lands by it sold subsequently to the conveyance from the railroad company.

But the suit as distinctly presents another and entirely separate controversy, as to the right of the plaintiffs to a decree against the individual defendants

for such sum as shall be found upon an accounting, to be due from them upon sales prior to the conveyance from the railroad company. With that controversy the land company, as a corporation, has no necessary connection. It can be fully determined as between the parties actually interested in it without the presence of that company as a party in the cause. Had the present suit sought no other relief than such a decree, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such a controversy does not cease to be one wholly between the plaintiffs and those defendants because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and the land company. When the petition for removal was presented, there was in the suit, as framed by plaintiffs, a controversy wholly between citizens of different States, that is, between the plaintiffs, citizens respectively of Minnesota and Indiana, and the individual defendants, citizens of New York, Wisconsin, and Massachusetts. And since the presence of the land company is not essential to its full determination, the defendants, citizens of New York, Wisconsin, and Massachusetts, were entitled, by the express words of the statute, to have the suit removed to the Federal Court."

In the case at bar, it cannot be said that the suit was a suit. There could, under the several allegations of the petition, be a verdict against the Railway Company and in favor of the three resident defendants. A possible and proper judgment need not have been joint. Whenever it appears, as here, that a controversy between the plaintiff and the removing defendant is separate and distinct and that other defendants

are not interested therein, a removal is proper. *Bentel v. Chicago, M. & St. P. Ry. Co. et al.*, 26 Fed. Rep. 50; *Elkins v. Howell*, 140 Fed. Rep. 157; *McGuire v. Great Northern R. Co.*, 153 Fed. Rep. 484, 489; *Wheeling Creek Gas, Coal & Coke Co. v. Elder*, 170 Fed. Rep. 215; *Harter v. Kernochan*, 103 U. S. 562; *Connell v. Smiley*, 156 U. S. 335, 341.

It is true that a separate controversy is not identical in signification with a separable cause of action, as there may be separate remedies against several parties for the same cause of action, there being but one subject-matter of the controversy in question; but where there are, as here, separate and distinct causes of action in the same suit, either of which might have been sued upon alone, then there are separate controversies within the meaning of the statute. *Guiger v. Western N. C. R. Co.*, 21 Fed. Rep. 81, 83.

In *Boatmen's Bank v. Fitzler*, 185 Fed. Rep. 650, 653, Circuit Judge Sanborn, in discussing the separable controversy clause of the second section of the Removal Act, held that the test of removability under this clause was as follows:

"Separate and distinct causes of action disclosed by the record in a single suit, upon either of which a separate suit could have been maintained, and the determination of neither of which is essential to the disposition of the other, constitute separable contro-

version within the meaning of the acts of Congress."

This rule was expressly approved by this Court in *Trinidad v. Boutman's Bank*, 212 U. S. 364, 373. And in *Gaar v. Mathieson Alkali Works*, 190 U. S. 423, 432, Mr. Justice McKENNA laid down the rule with respect to separable controversies in the following language:

"A suit may, consistently with the rules of pleading, embrace several distinct controversies. *Barney v. Latham*, 103 U. S. 205, 212. It was said in *Hyde v. Ruble*, 104 U. S. 400: 'To entitle a party to a removal under this clause (second clause of Section 2 of the Act of 1875, same as second clause in the Act of 1887), there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different States from those on the other.' In other words, as expressed in *Fraser v. Jennison*, 106 U. S. 191, 194, 'the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun.' And when two or more causes of action are united in one suit there can be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants (now only the defendants) interested in the controversy, which if it had been sued on alone would be removable."

It is submitted that under the decisions of this Court, the case at bar was removable upon the application of the Railway Company, as it presented at least one controversy in respect to which the Railway Company was

not only the necessary defendant, but the only one possible, under the circumstances, on each side of which is a citizen of a different State from that on the other, and in which the other jurisdictional prerequisites are present. This controversy could and must be fully determined without the presence of the other parties to the suit, as it was begun. It could have been removed if sued upon alone. So far as this controversy was concerned, the allegations of the petition precluded a consideration of the responsibility of the resident defendants therefor.

The rule in other courts, under similar circumstances, is well settled.

In *Chicago & A. Ry. Co. v. New York, L. E. & N. R. Co. et al.*, 24 Fed. Rep. 516, 517 (C. C., S. D. N. Y.) a bill was filed to restrain the defendants from violating the conditions of several contracts, for an accounting and for damages. One cause of action against the defendants was founded upon an alleged breach of a particular clause of the agreement, whereby each defendant covenanted to make good any deficiency in the earnings of the plaintiff necessary to pay the plaintiff's interest upon an issue of bonds in proportion to which each defendant might respectively receive gross earnings accruing from its traffic with the plaintiff. The court held that this undertaking was not joint, but

several and distinct, and that the liability of each defendant was measured by its own proportion of gross earnings received from traffic with the plaintiff, and that the defendants were not sureties, or answerable for each other's default. And in holding that the cause of action was separable and removable, upon the petition of the non-resident defendant, the court said:

"Although a joint accounting is demanded, the liability of each defendant is several, and the complainant cannot convert a controversy which is wholly between itself and each of the two defendants into one between itself and both defendants, by treating it as joint in the prayer for relief. It is only where the cause of action is founded upon a joint and several liability that a plaintiff may, at his election, proceed against both defendants jointly or each severally."

In *Ferguson v. Chicago, M. & St. P. Ry. Co.*, 63 Fed. Rep. 177, 178, 180 (C. C., N. D. Iowa) suit was brought by a switchman in the employ of the defendant railway company against the railway company, its yard master and the engineer in charge of the switch engine which ran over the plaintiff's leg. In overruling a motion to remand the case to the State court, District Judge Shiras said:

"If the plaintiff in fact counts or declares upon one cause of action, and no more, then the case cannot contain a separable controversy. If, however, the petition in fact contains more than one cause of action, then a separable controversy exists; and, if the requisite diversity of citizenship exists between a sil-

sensary parties thereto, a ground for removal may thus be shown. * * * * * * * * * * * The petition in fact counts upon two causes of action,— one, the failure to furnish a properly equipped switch engine; the other, negligence in the handling of the engine after plaintiff had been thrown upon the track. The first cause named exists only against the railway company, and is wholly distinct from the second cause of action. If it be true that the engine was not properly constructed, and was lacking in appliances needed for the safety of the men employed thereon, that this breach of duty existed from the time the engine was put to work as a switch engine; and thus a cause of action existed against the company from that time, which would ripen into a right of action in favor of an employe whenever such employe received injury by reason thereof. The cause of action for the negligent handling of the engine and failure to exercise a proper lookout did not arise and was not in existence until the parties in charge of the engine undertook to move the engine along the track upon which plaintiff was injured. The first cause of action is based upon alleged negligence of the master in failing to furnish proper machinery; the second, upon alleged negligence of the co-servants of the plaintiff in the handling of the engine. Under the rules of the common law, the first is a cause of action against the railway company, but the second is not. The first cause is therefore based upon the legal duty, imposed by the common law upon the master, but not upon the employes, of furnishing safe machinery for the use of its servants, whereas the second cause, so far as the railway is concerned, is based upon the statute of Iowa, which makes the railway company liable, under given circumstances, for the negligence of its servants resulting in injury to a co-employe. It seems clear, therefore, that this suit is clearly separable into parts, and in fact, upon the trial, must be so separated; and that, when thus separated, there is presented a controversy between the plaintiff and the

railway company over the question whether the engine used for switching purposes in the yard at Sioux City was or was not properly constructed and equipped, and in this controversy the defendants Smith and Pollard are not parties. If this be true, then, as the suit involves a controversy wholly between citizens of different states, it was properly removed by the defendant company, and the motion to remand must be overruled."

In *Estey v. Nashville, C. & St. L. Ry. Co. et al.*, 95 Fed. Rep. 966 (C. C., M. D. Tenn.), suit was brought against the railway company and the Pullman Company, it being alleged that the plaintiff, a passenger on a sleeping car, was thrown from his berth by the negligence of the railway company in operating its train, and by the negligence of the Pullman Company in not providing proper means to prevent the plaintiff from being thrown from his berth. It was held that the controversy between the plaintiff and the railway company was separable as the cause of action against it was distinct, and with which the co-defendant had no concern.

In *Gustafson v. Chicago, R. I. & P. Ry. Co. et al.*, 123 Fed. Rep. 86, 89-90, (C. C., W. D. Mo.) a case arising in the State of Missouri, suit was brought by an employe against the railway company and a resident employe, it being alleged, among other things, that the railway company had negligently failed to make proper rules for running its trains, or to put up proper station

signals, and required the train to be negligently run at a speed of fifty miles an hour. In holding that this was a separate controversy which entitled the railway company to a removal, District Judge Phillips, said:

"It is to be observed in the first place, that if it be conceded that it was the duty of the defendant railway company to establish a schedule time table for the running of trains over the road at the point in question, to establish proper station boundaries at the yard limits at Harlem, and to set up signs, posts, and visible objects to indicate the yard limits of said station, and that it failed of its duty in this respect, what possible connection had the defendant Hanna, and engineer, with such matters? These duties and obligations devolved upon the master alone. So that if these acts of negligence contributed to the injury in question, as it must be assumed the pleader intends by inserting them in the petition, there was no co-operation therein by the defendant Hanna, and consequently no joint cause of action for these derelictions of duty is stated. And it would entitle the defendant railway company, who alone is responsible for such dereliction, to remove the whole controversy into this jurisdiction."

In *Henry v. Illinois Central R. Co. et al.*, 182 Fed. Rep. 715, 717-718, (C. C., S. D. Iowa) suit was brought against a railroad company and an engineer of one of its trains for negligently causing the death of plaintiff's intestate. Acts of negligence which were essention to make out a cause of action against the railroad company under the State statute, were alleged, with which its co-defendant had no concern. In view of this situation, District Judge McPherson held that the

suit contained a separable controversy which was removable to the United States Court, saying:

"To hold that this action is not separable is to so hold in the face of the fact that evidence of negligence can be introduced against the company of acts of which Chapman (the co-defendant) had nothing whatever to do, and, in the very nature of things, could not have been connected with. In my judgment, the action is separable."

This language might be used with respect to the situation before this Court, with equal force.

The position of the Railway Company in the case at bar is fully shown and approved by the decision of the Supreme Court of Georgia in *Southern Railway Co. v. Edwards*, 116 Ga. 1022; 42 S. E. Rep. 375. The syllabus, which was by the court, is as follows:

"Although there may, in a suit against two or more defendants, one of whom is a non-resident, be charges of concurrent negligence against all, yet if there be also a distinct charge of negligence against the non-resident alone, sufficient in and of itself to give rise to a cause of action, the case is one involving a separable controversy between citizens of different States, and therefore removable to the proper United States court."

And in the opinion, the court, by Presiding Justice LUMPKIN, said:

"An action was brought by Edwards, an employe of the Southern Railway Company, against it and Russell, one of its engineers, for personal injuries which Edwards suffered in consequence of having been struck by a lump of coal which fell from the tender of

a passing locomotive of which Russell was in charge. The company, which is a non-resident of this State, is here upon a bill of exceptions assigning error upon the refusal of the trial court to grant an order removing the case to the Federal Court. The plaintiff in his petition alleges that both the company and Russell were guilty of a number of specified acts of negligence, one of which was overloading the tender with coal. It is in one paragraph of the petition also alleged that the company was negligent 'in not providing said engine with an engineer who was careful and prudent, and who would not have permitted said tender to be thus overloaded.' In *Railway Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, it was held that, 'when concurrent negligence is charged, the controversy is not separable.' The decision in this case therefore seems to be authority for the proposition that, in so far as related to the joint acts of negligence, the case made by the plaintiff's petition would not be one which could properly be removed to the United States court. Be this as it may, however, we are quite confident that, because of that paragraph of the petition specially mentioned above, the case was removable. That paragraph certainly did not charge an act of 'concurrent negligence,' for it cannot be true that the company's negligence in providing a careless and incompetent engineer was an act in which the latter participated. Indeed, the plaintiff does not undertake to allege that this was so, but makes his charge of negligence with respect to employing an incompetent engineer against the company alone. As to this particular matter, therefore, there was a 'separable controversy' between the plaintiff and the company. The alleged negligent act of employing such an engineer, with resulting damage to the plaintiff, would, in and of itself, have given rise to a distinct cause of action, involving a controversy wholly between citizens of different States, and a suit of this kind would certainly have been removable. It makes

no difference that in the present case such a controversy exists in connection with others that may not be separable. The fact that there is in the suit 'a controversy which is wholly between citizens of different States, and which can be fully determined as between them' brings the case within the removal act of 1887. Black, Dill. Rem. Causes, sec. 139. See, also section 143, and cases cited. That there is a separable controversy must appear from the plaintiff's pleadings. Id., sec. 141. When removal is proper, the effect is to carry the entire case into the Federal Court. Id. sec. 142. The court erred in not granting the order of removal."

In *Addyman v. Southern Railway Co. et al.*, 177 Fed. Rep. 571 (C. C., N. D. Ga.), suit was brought against the Southern Railway Company and the engineer and conductor of the train which, it was alleged, killed the plaintiff's husband. Two individual defendants were citizens of the same State as the plaintiff. The petition after alleging several joint and concurrent acts of negligence of the railway company and the individual defendants; then charged that the engineer was generally negligent in failing to sound the whistle at public crossings and stations, and ran his engine at a great and careless rate of speed; that he failed to signal the approach of the engine in thickly populated communities where pedestrians used the track of the railway company, and failed to anticipate the presence of pedestrians on the track of the defendant in thickly populated communities, all of which facts were known to the defendant company, and that, therefore, "the de-

fendant company was willfully and wantonly careless and negligent in allowing the said Perkins to operate the said engine by reason thereof."

District Judge Stevenson held, following the Edwards case, supra, that the controversy between the plaintiff and the railway company, as to the cause of action in which the resident defendants were not interested, was separable and that, therefore, the suit was properly removed to the United States Court.

The situation in the case at bar is clearly illustrated by the decision of the Circuit Court of Appeals of the Sixth Circuit, in the recent case of Nichols v. Chesapeake & O. Ry. Co., 195 Fed. Rep. 913, 915-916. Nichols, a citizen of the State of Kentucky, and a brakeman in the employ of the defendant railway company, brought an action in a court of that State against the railway company, a Virginia corporation, and Cook, a citizen of Kentucky. It was charged that Cook, the engineer in charge of the train with which the plaintiff was working when injured, was negligent and that through him the railway company was liable. It was also charged, by an amended petition, that the defendant railway company had violated the provisions of the Federal Safety Appliance Act and that the injury was due in part to such violation. In holding that this separate charge of negligence against the railway com-

pany was a separable controversy, entitling the railway company to a removal of the suit to the United States Court, Circuit Judge Denison, said:

"By the amended petition of July, 1905, it appeared that a controversy existed whether the Railway Company was liable to Nichols by reason of the existence and effect of the Safety Appliance Act. This was a controversy with which Cook was not concerned. It was not alleged that he was liable, or that the Railway Company, through him, was liable, upon this subject-matter. At the same time the petition alleged a joint liability against the Company and Cook, resulting from Cook's common-law negligence as engineer in the management of the train. It has been distinctly held by the Supreme Court (*Union Pacific Ry. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983) that the liability under a statute for failing to observe its provisions and the liability under the common-law rules of negligence may give rise to causes of action so separate that one may be barred by statute where the other would not be. It seems necessarily to follow that, where there are separate or distinct causes of action, there must be separable controversies. Each cause of action must present a controversy. Different rights of action may, it is true, often be joined in one suit, but this does not make them inseparable. The existence of the 'separable controversy' right of removal pre-supposes that it may be found joined in one action with another controversy. In the present case, even if the cause of action is not 'separate,' yet the 'separable' character of the claim under the statute is made clear by the fact that one of the defendants has no concern with this question. We are satisfied that the second removal petition conferred jurisdiction on the Federal Court (*Jackson v. C., R. I. & P. Ry. Co.*, 178 Fed. 432, 102 C. C. A. 189), and that the action which had been commenced in March and was then pending in the state

court upon the amended July petition was, for the first time, effectively removed."

This decision leaves little for further argument. With the question of liability for the negligent handling of the engine, the three resident defendants had no concern; for this negligence the Railway Company could not be held liable through them. It was a separate and distinct issue, by which a separable controversy between the plaintiff and the Railway Company arose, and which entitled the Railway Company to have the suit removed to the United States Court. *Beattel v. Chicago, M. & St. P. Ry. Co. et al.*, 26 Fed. Rep. 50; *Hartshorn v. Atchison, T. & S. F. R. Co. et al.*, 77 Fed. Rep. 9 (C. C., W. D. Mo.); *Elkins v. Hoxsell, et al.*, 140 Fed. Rep. 157 (C. C., N. D. W. Va.); *McGuire v. Great Northern Ry. Co. et al.*, 153 Fed. Rep. 424 (C. C., N. D. Ia.); *Wheeling Creek Gas, Coal & Coke Co. v. Elder, et al.*, 170 Fed. Rep. 215 (C. C., N. D. W. Va.)

In the cases before this Court in which it has been held that a separable controversy did not exist, the railway company or the master either jointly participated in the only act of which complaint was made, or was sought to be held liable, under the policy of the law, for specific acts of negligence of its employes, as authorized by the practice of the State where the suit was commenced. In no one of these cases was there a

separate charge of negligence against the master, aside from the alleged acts of negligence of the servants.

It is respectfully submitted that the Circuit Court of Daviess County, Missouri, and the Court of Appeals of the State of Missouri erred in denying the petition of The Chicago, Rock Island and Pacific Railway Company, the plaintiff in error herein, asking that this suit be removed to the United States Court.

F. C. DILLARD,
PAUL E. WALKER,
Attorneys for Plaintiffs in Error.

APPENDIX.

In Order that the Questions Discussed in this Brief May Be More Conveniently Examined, a Detailed Discussion of the Decisions of this Court Construing the Separable Controversy Provisions of the Removal Act is Submitted as an Appendix.

In *Louisville & N. R. Co. v. Ide*, 114 U. S. 52, 56, an action was brought against several railway companies for the violation of several contracts which were alleged to be joint and binding on all of the defendants, jointly and in the same right. There was no claim of a separate cause of action in favor of plaintiff and against the removing defendant. "The claim of right to a removal is based entirely on the fact that . . . the petitioning defendant, has presented a separate defence to the joint action by filing a separate answer tendering separate issues for trial." This, of course, did not introduce a separate controversy within the meaning of the statute. The defendants had entered into certain contracts for the transportation of property. On the one side of the controversy, growing out of a failure to carry out the terms of the contracts, is the plaintiff, and on the other all of the defendants. It is apparent that such a controversy is not divisible.

In *Pirie, et al v. Tvedt, et al.*, 115 U. S. 41, 43, an action was commenced against the defendants to recover damages for a malicious prosecution, it being

alleged in the petition that the defendants confederating together, and with a malicious and criminal design to injure the plaintiffs, wrongfully, unlawfully and maliciously procured an action to be commenced against them, and maliciously conspired together to cause a writ of attachment to be issued upon the property of the plaintiffs. A non-resident defendant filed a petition for removal on the ground that the controversy between the plaintiff and it was separable. Upon such allegations, no claim that a separable controversy existed could have been made properly. In holding that a separable controversy did not exist, this Court said:

"There is here, according to the complaint, but a single cause of action, and that is the alleged malicious prosecution of the plaintiffs by all the defendants acting in concert. The cause of action is several as well as joint, and the plaintiffs might have sued each defendant separately, or all jointly."

The separate answers filed by the plaintiffs were immaterial, as a separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final determination in his own way. Mr. Justice HARLAN, with whom concurred Mr. Justice WOODS, dissented from this decision on the ground that the petition showed a separable cause of action, and in speaking generally of the test of separ-

ability under the statute, Mr. Justice HARLAN said:

"It seems to us that where the plaintiff, in a suit against several defendants in tort, is required to prove a joint cause of action against all of them, but may have judgment as to those against whom he makes a case, there is, within the meaning of the act of Congress, a controversy in the suit, which is wholly between the plaintiff and each defendant, and finally determinable, as between them, without the presence of the other defendants as parties in the cause."

In *Sloane, et al v. Anderson*, 117 U. S. 275, an action was brought to recover damages by reason of the fact that the defendants took possession of the property of the plaintiffs and stopped their business for twenty-five days. In affirming the order remanding the suit, this Court said:

"In the present case there is, according to the complaint, but a single cause of action, and that is the wrongful seizure of the property of the plaintiff by the united efforts of all the defendants acting in common."

It being alleged that all of the defendants concurred in and acted jointly in the commission of the only offence of which complaint was made, it is manifest that the cause of action was joint or several at the option of the plaintiffs.

In *Stone v. South Carolina*, 117 U. S. 430, an action was brought by the State of South Carolina to recover a balance claimed to be due from Corbin & Stone, a co-partnership, for moneys collected by the firm for

the State and not paid over. One of the partners, a non-resident, petitioned for a removal on the ground of diversity of citizenship. This Court held that the statute did not authorize a removal of a suit between a State and citizens of another state on the grounds of diversity of citizenship, as a State cannot, in the nature of things, be a citizen of any State. No other ruling was possible under the terms of the statute. This Court also said that the cause of action was joint and that no separable controversy existed between the plaintiff and the removing defendant, saying:

"The money sued for was received by the defendants as partners, and they are liable jointly for its payment, if they are liable at all."

It is likewise apparent that, as to this feature of the case, no other decision could have been expected.

In *Plymouth Gold Mining Co. v. Amador Canal Co.*, 118 U. S. 264, 270, a suit was brought against the Mining Company and certain individuals to enjoin them from polluting the waters running into the canal of the plaintiff, and to recover damages for what had already been done in that way. It was alleged that the pollution had been caused by the acts of the defendants. In holding that the suit was not removable, this Court said:

"Upon the face of the complaint there is in the suit but a single cause of action, and that is the wrongful

pollution of the water of the plaintiff's canal by the united action of all the defendants working together. Such being the case, the controversy was not separable for the purpose of a removal, even though the defendants answered separately, setting up separate defences."

The complaint in this case charged that all of the defendants were jointly responsible for the pollution of the canal, and were, therefore, necessary and proper parties.

In *Little et al v. Giles, et al.*, 118 U. S. 596, a bill was filed to quiet the title of the complainants, charging that the defendants as co-conspirators were scheming to raise a cloud on the title of the complainants for the purpose of defrauding them of their property. Under such an allegation the Court held that the cause of action as stated in the bill was joint, as was, of course, apparent.

In *East Tennessee, V. & G. R. Co. v. Grayson*, 119 U. S. 240, a suit was brought to set aside a lease for want of authority to make it, and the lessor and the lessee were made parties defendant. It is apparent, as this Court held, that both the lessor and the lessee are necessary parties, and that the cause of action against them, if any, was joint.

In *Terrence v. Shedd*, 144 U. S. 527, a suit was commenced by the complainant for the partition of a tract

of land, to an undivided third of which, the complainant claimed title. Subsequently a party was permitted to intervene and to file an answer and cross bill, admitting the deed to the plaintiff, but alleging that it was in trust for him, and claiming an equitable title in whatever should be set off to the plaintiff. It was claimed that by reason of the intervention a separable controversy was presented. In holding that a separable controversy within the meaning of the Removal Statute was not present, this Court held, that the object of the suit was not merely to establish the title of the plaintiff in an undivided share of the land, but was the partition of the whole land, and the conversion of his undivided share into an entire estate in a proportional part, as well as the establishment of his title against all of the defendants. The controversy between the plaintiff and the intervenor related only to the title claimed by the plaintiff in an undivided share, while the defendants as a class denied that either the plaintiff or the intervenor had any title whatever. It was apparent therefore, that no one of the parties could recover judgment setting off to him any share in the land, without establishing a title, not only as between the plaintiff and the intervenor, but also as against all of the other defendants. The controversy between the plaintiff and the intervenor was merely incidental to

the main object of the suit, and could not be determined as between them without the presence of the other defendants, and did not, therefore, constitute such a separate controversy as would justify a removal to the United States Court.

The decisions in the foregoing cases seem to follow as a matter of course; because in each one the cause of action set forth in the petition was joint, and all of the defendants were necessary parties to the determination of the only question before the Court. Under such circumstances the controversy between the plaintiff and one of the defendants could not be separable.

The case of *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, is not in point. That was an action brought in the State of Illinois by a citizen of that State against two railroad companies, one a corporation of Illinois, and the other a corporation of Kentucky, for their joint and concurrent negligence in breaking and entering her close and tearing up and carrying away a railroad switch. There was no allegation of fraud with respect to the joinder of the Illinois corporation. This court simply held that a joint action being brought by the plaintiff, a separable controversy did not exist between the plaintiff and the foreign corporation. It was apparent from the allegations of the petition that the cause of action was joint or several at the option of

the plaintiff, and there could not, of necessity, be a separable controversy.

In *Whitcomb v. Smithson*, 175 U. S. 635, an action was commenced by a citizen of Minnesota in a court of that state against the Chicago Great Western Railway Company and Whitcomb and Morris, Receivers of the Wisconsin Central Company, to recover for personal injuries received while acting as a locomotive fireman for the Chicago, Great Western Company in a collision between the locomotive on which he was at work and another locomotive operated by Whitcomb and Morris, as receivers. The receivers asked for a removal on the ground that the controversy between the plaintiff and them was separable, and while that question was not the one principally before this Court, yet it is apparent that the charge in the petition showed as a matter of fact that the defendants were jointly liable, and that, therefore, the plaintiff had a right to sue them jointly if he choose.

In the case of *Chicago, R. I. & P. Ry. Co. v. Martin*, 178 U. S. 245, 248, is similar. In that case suit was brought by a citizen of Kansas in a court of that state against a foreign corporation and the receivers of another railroad corporation who were citizens of Kansas, to recover damages for the alleged joint negligence of the defendants, resulting in a collision between two

trains of the respective parties. The question before this court was not whether there was a separable controversy between the receivers and the plaintiff; in fact the removal was applied for by the receivers solely on the ground that the suit arose under the constitution and laws of the United States, no claim being made that there was a separable controversy. It is apparent, also, from the allegations that the cause of action was joint and that there was no separable controversy.

All that was decided in the case of *Powers vs. Chesapeake & O. Ry. Co.*, 169 U. S. 92, was that, if after the time prescribed by statute or rule of court of the State for answering the petition had elapsed, nevertheless a suit in which a joint cause of action was alleged against several defendants, a part of whom are residents and citizens of the same state as the plaintiff, may be removed whenever the action is discontinued, at the request of the plaintiff, as to the resident defendants. In discussing the situation Mr. Justice Gray stated that it was well settled that an action of tort which might have been brought against many persons, or any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants to the Federal Court. This rule is, of course, fundamental. But with respect to whether

a master and servant could be joined in an action for a tort under circumstances existing in this case, it was said that it was unnecessary to consider which of the views was the correct one, as the Circuit Court by remanding the case finally adjudged as between the parties and for the purposes of this case, that the case was not removable, and that order was not reviewable.

The case of *Chesapeake & O. Ry. Co. v. Dixon*, 179 U. S. 131, 135, to which reference is so frequently made in cases involving the removal of actions from State to Federal Courts, in no particular sustains the contention that the petition for removal in the case at bar was properly denied. In that case, suit was brought by a citizen of Kentucky in a court of that State against a railway company organized under the laws of the State of Virginia and two of its employes who were citizens of Kentucky, to recover damages by reason of the death of plaintiff's intestate, alleged to have been caused by the negligence of the two resident employes in the management of a train of the railway company.

By Section 241 of the Constitution of Kentucky it is provided that,

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then,

in every such case, damages may be recovered for such death, from the corporations and persons so causing the same."

And by Section 6 of the Kentucky statutes it is provided that,

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is wilful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representatives of the deceased."

In view of this situation, the Court of Appeals of Kentucky held that the cause of action was joint and that there was no separable controversy between the plaintiff and the defendant railway company which entitled the latter to remove the case to the Federal Court. In speaking of this situation, Mr. Chief Justice PRYOR said:

"The cause of action thus created is independent of any right of action the deceased may have had, or would have had if he had survived the injury; and in this case the Court of Appeals held that the company and its engineer and fireman were jointly liable for Dixon's death, if caused by the negligence of these employes; and that the cause of action as alleged against all the defendants was an entire cause of action."

It would seem to follow as a matter of course, that

since the defendants were made jointly and severally liable by the constitution and statutes of Kentucky, a plaintiff might sue all parties made liable under the constitution and statutes in a single action. One of the parties thus made jointly liable would have no right to say that a cause of action should be separable, which the specific terms of the constitution and the statutes made joint.

For the same reason the case of *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Bohon*, 200 U. S. 221, 225-226, is not controlling. In that case the petition charged that the plaintiff's intestate while employed as a brakeman and switchman was killed by the negligence of the defendant railway company and its engineer. The action was brought by a citizen of Kentucky in a court of that State against a foreign railway corporation and its engineer who was likewise a citizen of Kentucky. The railway company asked for a removal of the case to the Federal Court upon the sole ground that there was a separable controversy between it and the plaintiff. The court below held that under the express provisions of the constitution and statutes of Kentucky, hereinbefore set forth, the cause of action was joint, and refused to remove the case to the Federal Court. In affirming this ruling, Mr. Justice DAY, speaking for this Court, called atten-

tion to the specific provisions of the Kentucky constitution and statutes, and noted that the State courts of Kentucky had held, in construing these provisions, that the cause of action thereunder was joint., *Winston's Administrator v. Illinois Central R. Co. et al.*, 111 Ky. 954; 65 S. W. Rep. 13, and it was held that since the action was properly joint in the forum in which it was being prosecuted, it could not be removed as a separable controversy under the Act of Congress, the Court saying:

"We have under consideration an action for tort which by the constitution and laws of the State, as interpreted by the highest court in the State, gives a joint remedy against master and servant to recover for negligent injuries. . . . A State has an unquestionable right by its constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury, and the plaintiff in due course of law and in good faith has filed a petition electing to sue for a joint recovery given by the laws of the State, we know of nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a non-resident defendant therein properly joined in the action under the constitution and laws of the State wherein it is conducting its operations and is duly served with process."

In these cases, there being direct and specific authority for the joinder of the defendants under the constitution and laws of Kentucky, a defendant had no right

to say that the cause of action which had been made joint by statute, should be separable.

In *Southern Railway Co. v. Carson*, 194 U. S. 136, an action was brought by an employe against the railroad company and two resident defendants, both employes, it being charged that the injury to the plaintiff was due to the joint and concurrent carelessness, negligence, and recklessness of the defendants, and to their joint and concurrent recklessness, carelessness, willfulness and wanton disregard of the plaintiff's right and safety. *The non-resident defendant did not file a petition for removal.* In discussing the case, Mr. Chief Justice Fuller took occasion to say, however, that the action would not have been removable under the rule laid down in the case of *Powers v. Chesapeake & O. Ry. Co., supra*, and *Chesapeake & O. Ry. Co. v. Dixon, supra*, saying that under the law of South Carolina, where the suit was brought, the identification of master and servant was so complete that the liability of both might be enforced in the same action. By an act of 1898, incorporated in the South Carolina Code of Civil Procedure as Sec. 186 a, the statutes of that State expressly authorized the joinder. *Schumfert v. Southern Ry. Co., et al.*, 65 S. C. 332, 43 S. E. Rep. 813. The right of removal was not involved in this case, as no request was made therefor, and the statutes

of the State where the suit was begun, expressly authorized the joinder in giving the right of action, for both of which reasons the case was in-applicable to the situation now under discussion.

Neither does the case of *Illinois Central R. Co. v. Sheegog's Administrator*, 215 U. S. 308, 316, 318, conflict with the position of the plaintiffs in error. As appears from the decision of the Court of Appeals of Kentucky, *Illinois Central R. Co. v. Sheegog's Administrator*, 126 Ky. 252, 103 S. W. Rep. 323, the action was instituted by the administrator of Sheegog, who was killed in a derailment of an engine on which he was engineer. The Chicago, St. Louis & New Orleans Railroad Company, the owner and lessor of the road; the Illinois Central Railroad Company, the lessee of the road, and the conductor in charge of the train, Durbin, were all made defendants to the action. The plaintiff was a citizen of Kentucky, as was the defendant Durbin. The Chicago, St. Louis & New Orleans Railroad Company was a Kentucky corporation, and the Illinois Central Railroad Company was organized under the laws of the State of Illinois. Among other things, it was alleged that the two defendant railroad companies were negligent, in that the lessor negligently maintained the railroad, and that the lessee company was negligent in permitting the road to be

operated while in such defective and dangerous condition. The charge was that through the negligence of both defendant railroad companies the roadbed, track, etc., were in an improper condition, and that through the negligence of the lessee company the engine and cars were in an improper condition, and that the death was due to all of these causes acting jointly. There was also a charge that the conductor was negligent in ordering and directing the management of the train. The defendant Illinois Central Railroad Company filed its petition and bond for removal, alleging only that a separable controversy existed between it and the plaintiff, determinable between them without the presence of either of the co-defendants. *It was conceded that the petition of the plaintiff, stated a joint cause of action against the defendants.* The State court refused to order the removal, and the Court of Appeals of Kentucky upheld the ruling on the ground that since it was conceded that a joint cause of action was alleged in the petition against the defendants, the controversy was not separable, as the distinction between different forms of action had been abolished by the Kentucky Code of Practice, and that all persons, under the rule in Kentucky, who were liable for a wrong might be sued jointly in that state in a single action. Since it was conceded that the petition stated

a joint cause of action, and since by the express terms of the constitution and statute of Kentucky such defendants were made jointly liable, it followed as a matter of course that, on the face of the petition, the cause was not removable, and, as an additional ground for refusing to order the removal, the State court called attention to Section 203 of the Kentucky Constitution, which is in these words:

"No corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use or enjoyment of such franchise or any of its privileges."

The court in construing this section of the constitution, and following the earlier case of *McCabe's Administratrix v. Maysville & Big Sandy Railroad Co.*, 112 Ky. 861, 66 S. W. Rep. 1054, held that no lease made by a railroad corporation could exempt it from liability for the wrongs of its lessee. The granting of the franchise by the State was upon the condition that the railroad company receiving the franchise must pay damages to any person injured by any want of care in using the right so granted, and that the responsibility of the lessor extends to the employes of the lessee, when, as here, the injury results from the negligent omission by the lessor of some duty owed to the public,

such as the proper construction or maintenance of the railroad. The presence of the resident employe as a defendant was not considered by the State court. In affirming the ruling of the Kentucky Court of Appeals, Mr. Justice HOLMES said:

"In the case of a tort which gives rise to a joint and several liability the plaintiff has an absolute right to elect, and to sue the tort-feasors jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face. *Alabama Great Southern Ry. Co. v. Thompson*, 200 U. S. 206. *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Bohon*, 200 U. S. 221. If the legal effect of the declaration in this case is that the Illinois Central Railroad Company was guilty of certain acts and omissions by reason of which a joint liability was imposed upon it and its lessor, the joinder could not be fraudulent in a legal sense on any ground except that the charge against the alleged immediate wrongdoer, the Illinois Central Railroad itself, was fraudulent and false."

It must follow, of course, that where the constitution and laws of a state authorize a joint action against several defendants, a plaintiff has a legal right, in the absence of fraud, to sue any one or all of such persons. The question of joinder in this particular case was solely a question of whether or not the Kentucky statutes and decisions made the particular defendants jointly liable, and, as this Court said, the Kentucky

Court of Appeals appears to have thus decided it, and it was upon that theory only that the case was held to be not removable by this Court, as is clearly shown by the following statement from the opinion:

"So that, whatever may be the precise line drawn by that court hereafter, it stands decided that in Kentucky the facts alleged and proved against the Illinois Central Railroad in this case made its lessor jointly liable as matter of law. This decision we are bound to respect.

It follows, if our interpretation of the decision is correct, that no allegations were necessary concerning the Chicago, St. Louis and New Orleans Railroad Company, except that it owned and had let the road to its co-defendant. The joint liability arising from the fault of the Illinois Central Road gave the plaintiff an absolute option to sue both if he preferred, and no motive could make his choice a fraud."

In speaking of the question involved in the Sheegog case, District Judge Cochran in the recent case of *M'Allister v. Chesapeake & O. R. Co. et al.*, 198 Fed. Rep. 660, 664 (C. C., E. D. Ky.), said:

"In brief, the point of decision in the Sheegog case was that the death of plaintiff's intestate was caused by the lessor's own wrongful act, and the lessor was not held liable for the wrongful act of the lessee."

In the discussion of this case, it must not be lost sight of that under the constitution and statute of Kentucky permitting recovery for death, a railway company and its negligent employe were made jointly liable.

The same situation arose in the recent case of *Chicago, Burlington & Quincy Ry. Co. v. Willard*, 220 U. S. 413, 424-425. In that case a citizen of Illinois brought an action against a railroad company which was organized under the laws of Illinois, as owner of the road, and against a railway company organized under the laws of the state of Iowa, as lessee of and operating the road, upon which the intestate of the plaintiff was killed. It appeared that, under the statutes and decisions of the state of Illinois, a lessor railroad company is required to answer for the consequences of the negligence of the lessee company in the operation of the road, and that the statutory permission to lease a railroad does not relieve the lessor from the obligations cast upon it by its charter, and that a joint action may be brought against the lessor company and the lessee company to recover damages for the negligent operation of the road. *Baisley v. St. Louis, A. & T. H. R. Co.*, 119 Ill. 68, 8 N. E. Rep. 859; *Pennsylvania Co. v. Ellet*, 132 Ill. 654, 24 N. E. Rep. 559; *Chicago & Erie R. Co. v. Meech*, 163 Ill. 305, 45 N. E. Rep. 290; *Chicago & Grand Trunk Ry. Co. v. Hart*, 209 Ill. 414, 70 N. E. Rep. 654; *Chicago & W. I. R. Co. v. Newell*, 212 Ill. 332, 72 N. E. Rep. 416. In view of these decisions, Mr. Justice HARLAN said:

"It is thus made clear that if the plaintiff had any

cause of action on account of the injury in question he could bring a joint action in an Illinois court against the lessor and lessee companies. Whatever liability was incurred on account of the death of the plaintiff's intestate could, at the plaintiff's election, be asserted against both companies in one joint action, or, at his election, against either of them in a separate action."

This conclusion followed as a matter of course, as the statutes and decisions of Illinois made the cause of action joint and gave the plaintiff the right to sue both defendants jointly, if he desired.

If, under the State law, the lessor had not been liable to the plaintiff in the Sheegog and Willard cases, both suits would have been removable to the United States Court. Thus in *Williard v. Spartanburg, U. & C. R. Co. et al.*, 124 Fed. Rep. 796 (C. C., S. C.), Circuit Judge Simonton held that an action by an employe of a railroad company operating a railroad under a lease, against such company and its lessor, to recover for a personal injury alleged to have been due to the negligence of another employe of the same employer, presents a separable controversy between the plaintiff and the lessee company, and that the suit was removable, where the lessee is a foreign corporation. In this case the lessor, the resident defendant, was held not liable under the allegations of the petition as the injury was not due to the violation of a duty which the lessor company owed to the plaintiff, as one of the general public.

And in *M'Allister v. Chesapeake & O. R. Co. et al.*, 198 Fed. Rep. 660, (D. C., E. D. Ky.), the Sheegog case is clearly distinguished, even under the Kentucky rule. In that case an action was brought in a state court of Kentucky, by a citizen of that State, against a non-resident lessee railroad company and its resident lessor, to recover for the death of the plaintiff's intestate, who was struck and killed by a train operated by the lessee company. The court held, as a matter of law, that the petition showed that the death of the plaintiff's intestate was not caused by the violation on the part of the non-resident defendant, the lessor, of a public duty, that is, of a duty owed to the public generally, and that, therefore, no cause of action was stated against the lessor, the resident defendant. For this reason it was held that the controversy between the plaintiff and the non-resident defendant, the lessee, was separable and the case properly removable to the United States Court.

In the consideration of the Powers, Dixon, Bohon and Sheegog cases, *supra*, it must be borne in mind that while, as has been pointed out, by the settled law in Kentucky, in which State all of these cases were commenced, in accordance with the constitution, the statutes and the recognized practice, servants whose negligent acts create the liability of a master, may be sued

jointly with the master (*Enos v. Kentucky Distilleries & Warehouse Co. et al.*, 189 Fed. Rep. 342, 346; 6th C. C. A.), yet the allegations of negligence with respect to such employes, the resident defendants, must be specific and must show a cause of action against them or the non-resident defendant may remove the suit to the Federal Court. *Cincinnati, N. O. & T. P. Ry. Co., v. Robertson*, 115 Ky. 858, 74 S. W. Rep. 1061; *Davis, Administrator v. Chesapeake & O. Ry. Co. et al.*, 116 Ky. 144, 75 S. W. Rep. 275; *Slaughter v. Nashville, C. & St. L. Ry. Co. et al.*, (Ky.), 91 S. W. Rep. 744. It is not sufficient that residents be joined as defendants and generally charged with responsibility; the petition, in order to defeat a removal, must show a real and substantial cause of action against the resident defendants and one recognized by the laws of that State.

In the discussion of the Kentucky cases, it is also well to bear in mind that the distinction between acts of misfeasance and those of nonfeasance is not recognized in that State. *Murray, et al. v. Cowherd*, (Ky.); 147 S. W. Rep. 6.

The case of *Southern Railway Co. v. Miller*, 217 U. S. 209, 216, is not an authority sustaining the proposition that, under all circumstances, a master and servant may be jointly sued for the negligent act of the servant. In that case a suit was brought against a rail-

way company, organized under the laws of the state of Virginia, and three of its employes who were citizens and residents of Georgia, by a plaintiff who was likewise a citizen and resident of Georgia. The plaintiff, an engineer in the employ of the defendant railway company, was injured in a collision between his train and another train of the railway company in charge of the three resident defendants, as engineer, conductor and brakeman, thereof, it being alleged that the three resident defendants were responsible for the collision by their joint and concurrent acts of misfeasance. The railway company filed a petition for removal to the Federal Court, upon the ground that the controversy between it and the plaintiff was separable. The Court of Appeals of Georgia, *Southern Ry. Co. et al. v. Miller*, 1 Ga. App. 616; 57 S. E. Rep. 1090, held that the petition for removal was properly denied; first, on the ground that the acts of negligence alleged against the resident defendants were acts of misfeasance, for if the acts of negligence alleged had been acts of omission or nonfeasance, a joint cause of action could not have been stated under the law of Georgia, *Southern Ry. Co. v. Grizzle*, 124 Ga. 735, 53 S. E. Rep. 244, 245; second, on the ground that under the statutes and decisions of Georgia, a joint cause of action could be brought against a master and servant for the negli-

gence of the servant. The decision was based, in this particular, upon the holding of the Supreme Court of Georgia in *Southern Ry. Co. v. Grizzle, supra*, which, in turn, was based upon the decision of the Supreme Court of Georgia in *Central of Georgia Railway Co. v. Brown*, 113 Ga. 414; 38 S. E. Rep. 989, in which it was held that owing to the abolition of the distinction between various causes of action by the Georgia Code, actions in trespass and trespass on the case could be joined in the same action, and that, therefore, a master and servant could be jointly sued for the negligence of the servant. In the Miller case, the court took occasion to call attention to the statutes of Georgia necessarily involved. By Section 2782 of the Georgia Code, every railroad company doing business in that state is held liable to an employe for "injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defects or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." By Section 115 of the Georgia Penal Code it is provided that:

"If any person employed in any capacity, by any railroad company doing business in this State, shall, in the course of such employment, be guilty of negligence, either by omission of duty or by any act of

commission, in relation to the matters intrusted to him, or about which he is employed, from which negligence serious bodily injury, but not death, occurs to another, he shall be guilty of criminal negligence, and shall be punished by confinement in the penitentiary not less than one nor more than two years, in the discretion of the court."

And, as the court said in the Miller case, "certainly an act which is thus made criminal is actionable in a civil suit, if injury results from such act." It thus appears that the defendant railway company was made liable by statute for the injury suffered by the plaintiff, and the resident defendants were likewise made liable by the statute to the plaintiff for the same injuries. The plaintiff claimed that his injuries were due to the joint negligence of the defendants, and the Code of Georgia authorized him to bring a joint cause of action against them. Under such circumstances, it is apparent that there was not a separable controversy between the defendant railway company and the plaintiff. In speaking of this situation, Mr. Justice Day said:

"The petition for removal contained no charge that the attempt to join the defendants was for the purpose of fraudulently avoiding the jurisdiction of the United States Court, or with a view to defeat a removal thereto. The case here presented is one in which the record discloses there was an attempt to join, in good faith, the railway company and the individual defendants as for a joint liability in tort."

And it was held by this Court that since the joinder was authorized by the laws of Georgia, and since the plaintiff had charged that the defendants were jointly and concurrently liable for his injuries, the action must be deemed to be such as the plaintiff had made it, in good faith, in his pleadings.

In the Supreme Court of the United States

OCTOBER TERM, 1912.

No. 132.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND MARTIN A. BARRETT.....*Plaintiffs in Error*

vs.

ALBERT H. SCHWYHART, ET AL....*Defendants in Error*

IN ERROR TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR, ALBERT H. SCHWYHART.

BRIEF.

I.

This case is not removable. The State Court properly retained jurisdiction.

Railroad vs. Dixon, 179 U. S. 131.
Railroad vs. Thompson, 200 U. S. 206.
Railroad vs. Bohn, 200 U. S. 221.
Southern Ry. Co. vs. Miller, 217 U. S. 209.
Chicago, B. & Q. R. Co. vs. Willard, 220 U. S. 413.

II.

The right of removal is wholly statutory and the State Court is not ousted of its jurisdiction unless the cause is properly removable.

Hanford vs. Davis, 163 U. S. 273.
Bors vs. Preston, 111 U. S. 252.
Mansfield vs. Swan, 111 U. S. 379.
Grace vs. Ins. Co., 109 U. S. 278.
Steamship Co. vs. Tugman, 106 U. S. 118.
Alabama Grt. So. Ry. Co. vs. Thompson, 200 U. S. 206.
Southern Ry. Co. vs. Carson, 194 U. S., l.c. 138.

All doubts are to be resolved in favor of the jurisdiction of the State Court.

Mexican Nat. Ry. Co. vs. Davidson, 157 U. S. 208.
Hanrick vs. Hanrick, 153 U. S. 192.
Shaw vs. Quincy Mineral Co., 145 U. S. 444.

The necessary jurisdictional facts must appear on the face of the pleadings to justify a removal.

18 Enc. Plead. & Prac. 297, and cases cited in Note 11.

The question as to whether there is a separable controversy is to be determined by the condition of the record in the State Court, and the facts necessary to give jurisdiction to the Federal Court must appear upon the face of the plaintiff's petition. The petition for removal cannot supply same unless fraud be sufficiently and specifically averred and proved.

Arkansas vs. Kans. & Tex. Coal Co., 183 U. S. 189.
Mountview Co. vs McFaddin, 180 U. S. 535.
Alabama & G. S. Ry. Co. vs. Thompson, 200 U. S. 206.
Central R. R. vs. Mills, 113 U. S. 257.
Tenn. vs. Union Bank, 152 U. S. 460.
Chicago B. & Q. R. Co. vs. Willard, 220 U. S. 413.

III.

The allegations of the petition of the plaintiff below are taken as confessed in determining whether the controversy is separable on application for removal.

L. & N. Ry. Co. vs. Lucinda Wangelin, 132 U. S. 602.
Railway Co. vs Grayson, 119 U. S. 240.
Railway Co. vs. Thompson, 200 U. S. 206.

In the case at bar the allegations of fraud in the petition for removal are insufficient and present no issuable fact.

Little York Gold Co. vs. Keys, 96 U. S. 199.
Provident Savs. Bank vs. Ford, 114 U. S. 635.
Louisville Ry. Co. vs. Wangelin, 132 U. S. 599.
Chesapeake Ry. Co. vs. Dixon, 179 U. S. 131.
Carson vs. Dunham, 121 U. S. 421.
Chicago B. & Q. R. Co. vs. Willard, 220 U. S., l.c. 426.
Plymouth Con. Min. Co. vs. Amador Canal Co., 118 U. S. 264.

St. L. & T. Ry. Co. vs. McBride, 141 U. S. 127.
Railway Co. vs. Thompson, 200 U. S. 206.

IV.

This case is distinguished on the facts from the case of Wrecker vs. National Enameling Co., 204 U. S. 176.

The case of Donovan vs. Wells Fargo & Co., 169 Fed. 363, relied on by plaintiff in error in the State Court is *sporadic* and wholly out of line with the rulings of this Court in the Thompson, Dixon, Bohon, Willard and other cases cited *supra.*

V.

In the interpretation of state statutes the United States Courts are bound by the decisions of the State Court of last resort, and will form an independent judgment as to their meaning, only when no such construction has been had.

Town of Enfield vs. Jordan, 119 U. S. 680.
Bank vs. Pennsylvania, 167 U. S. 461.
Hartford Ins. Co. vs. R. R. Co., 175 U. S. 91.
McCain vs. DesMoines, 174 U. S. 177.
Orr vs. Gilman, 183 U. S. 283.
Sioux City R. R. Co. vs. N. A. Trust Co., 173 U. S. 107.

VI.

There is no merit in the contention that the petition fails to state a cause of action against defendants, Reed and Barrett, and that therefore the cause is removable.

No question of pleadings can arise and be determined in removal proceedings. Any question as to the sufficiency of the petition is a question on the merits to be determined by the Court which tries the case. Even if no cause of action were stated, (and we insist there was) it would furnish no ground for removal and would in no wise affect the jurisdiction of the State Courts. As Mr. Justice Brewer said in speaking of the plaintiff's petition in the case of St. Louis & San Francisco Ry. vs. McBride, 141 U. S. 127, 35 Law Ed., l.c. 660:

> "Whether upon these facts the plaintiff is entitled to recover is not a matter of jurisdiction, but one of the merits of the controversy."

There is abundant authority to this effect:

Hax vs. Saspar, 31 Fed. 499;
Evans vs. Fulton, 96 Fed. 176;
Broadway Ins. Co. vs. Ry., 101 Fed. 507;
Fogarty vs. Railroad, 123 Fed. 973;
Railroad vs. McBride, 141 U. S. 127, 35 Law Ed., l.c. 660;

Thomas vs. G. N. Ry. Co., 147 Fed. 83, l.c. 86.

Judge Phillips in the case of Broadway Ins. Co. vs. Ry., 101 Fed., l.c. 510, says:

"The claim made by the railroad company that the bill cannot be maintained on the merits, cannot affect the question of removal, that being a matter for the determination of the State Court. Evans vs. Fulton (c. c.), 96 Fed. 176."

VII.

The plaintiff in error, Martin A. Barrett and H. L. Reed, were vice-principals.

R. S. Mo. 1909, Sec. 5435, reads as follows:

"All persons engaged in the service of any such railroad corporation doing business in this state, who are entrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the authority to direct any other servant in the performance of any duty of such servant, or with the duty of inspection or other duty owing by the master to the servant, are vice-principals of such corporation, and are not fellow-servants with such employes."

VIII.

Plaintiff in error, C. R. I. & P. Ry. Co., waived its petition for removal by filing a separate demurrer to the petition of the plaintiff below, before any order was made by the state court with reference to the petition for removal. (Printed Record, pages 35, 36.)

ARGUMENT.

The opinion of the Kansas City Court of Appeals in the case at bar (Printed Record, 7), (Schwyhart vs. Barrett et al, 145 Mo. App. 332) is the law of this case and is controlling upon the construction of the Missouri Statute (Sec. 2873 R. S. Mo. 1899) plead by plaintiff in error in his petition for removal and upon all questions of pleadings and practice in the state court and is conclusive upon the questions under the pleading as to the joint liability of the several defendants.

The decision of the State Court that the controversy between the plaintiff and defendants in the State Court under the law of Missouri is not a separable controversy is under the authorities, cited *supra*, binding on this court. This eliminates every contention, made by the plaintiff in error, except the single question as to whether or not the alleged poverty of some of the defendants in the state court and the wealth of others is a badge of fraud and is a sufficient allegation of fraud to remove the case from the State to the Federal Court.

The decision of the State Court in the case at bar releasing Novak and Reed from liability is not grounded upon the allegations of the petition of plaintiff below, but from the evidence adduced at the trial. Barrett's liability appears both from the petition and the evidence. The petition states a cause of action against Novak, but under the proof he was excused from liability. The right of removal does not, however, depend upon the evidence, on the merits presented at the trial, but on the allegations of the petition.

The plaintiff in error in the petition for removal undertakes to present but two questions:

1st. That the plaintiff did not have at the time of the institution of the suit, nor at the time of the filing of the petition for removal, any cause of action against the defendants, Martin A. Barrett, Frank Novak and H. L. Reed.

2nd. That the individual defendants are fraudulently joined as defendants because they are men of small means and have no or but little property from which a judgment against them or either of them, in this action could be collected, while the defendant railroad company is in opulent circumstances.

As before stated, the first question is eliminated by the decision of the Kansas City Court of Appeals in the case at bar and also by the following authorities:

R. S. Mo. 1899, 545, now Sec. 1734 R. S. Mo., 1909.
Myers vs. Transit Co., 99 Mo. App. 363.
Senn vs. Ry., 135 Mo. 512, l.c. 519.
Gebhardt vs. Ry., 97 Mo. App. 373.
Berger vs. Ry., 112 Mo. 238.
Wacher vs. Transit Co., 108 Mo. App. 645.
Holden vs. Ry., 108 Mo. App. 665.
Sluder vs. Transit Co., 187 Mo. 107.

Rapp vs. Transit Co., 190 Mo. 144.
Clancy vs Transit Co., 192 Mo. 615.
Haley vs. Ry., 197 Mo. 15.
Stotler vs C. & A. Ry Co., 200 Mo., l.c. 120.

As to the alleged question of fraud in joining the individual defendants, Judge Lamm in Stotler vs. Chicago & Alton Ry. Co. et al, 200 Mo. l.c. 119-120, very aptly said in discussing the alleged fraudulent joinder of a conductor and engineer:

> "That question becomes an edged tool, dangerous to meddle with, because on this record it is as easy to say that defendants injected the question of fraud into the petition of removal for the purpose of defeating the jurisdiction of the State Court as it is to say that plaintiff joined Wiseman and Haines, residents of Missouri, with the defendant corporation, a non-resident, for the purpose of defeating the jurisdiction of the Federal Court."

In Chicago, B. & Q. R. Co. vs. Willard, 220 U. S., l.c. 428, cited *supra*, the Court speaking of the joinder of parties say:

> "He may have preferred to have the case tried in the State Court just as the Iowa corporation preferred the Federal Court. But these preferences or motives, not fraudulent or unnatural, were of no consequence. They were immaterial in determining whether the plaintiff had a legal right to bring a joint action against the lessor and lessee companies and to carry it on in that form to a conclusion."

On this question, Johnson J. in delivering the opinion of the Kansas City Court of Appeals in the case at bar (Schwyhart vs. Barrett et al, 145 Mo. App., l.c. 348), speaking of the relative poverty or wealth of the defendants as a matter upon which fraud can be predicated, says:

> "The only remaining facts on which the conclusion is founded are that the individual defendants are men of small means and that the defendant company is solvent and of great wealth. These facts alone would not support a conclusion of fraud. A person injured by the wrong of another has a right to seek a judgment at law against the wrongdoer, regardless of the question of whether he can collect the judgment, if one should be recovered. (Stotler vs. Railroad, supra, 200 Mo. 107). A plaintiff's motives should not be impugned from the bare fact that he chooses to join solvent and insolvent defendants in the same action. With all of the facts alleged conceded to be true, the conclusion of fraud still would fail for lack of support."

Following the decision of this Court in the case of Railroad vs. Dixon, 179 U. S. 131, cited *supra*, a number of district judges by refined distinctions apparently [redacted] the opinion in that case. However, this Court has in its more recent decisions in the Thompson, Bohon, Miller and Willard cases so firmly established the doctrines here contended for, that we do not deem it essential to burden the Court with a review of those District Court decisions.

erroneously interpreted

The doctrine is well settled by the cases cited *supra*, (VI) that a removal cannot be had because of defective pleadings. The pleadings, however, in the case at bar were sufficient.

In the case of Southern Ry. Co. vs. Miller, 217 U. S. 209, the question as to statutory and common law liability of employees is squarely presented by the brief of the plaintiff in error, and Mr. Justice Day refers to and mentions with approval the opinion in 1 Ga. App. 616, as follows:

> "Under the practice in Georgia the case went to the Court of Appeals of that state on the question of the right to remove the case to the Federal Court. The decision of the Court of Appeals upon that question is reported in 1 Ga. App. 616, 57 S. E. Rep. 1020. In that case the Court dealt with the right under the law of Georgia to join the individual defendants with the railroad company; and held that the objections to the joinder were untenable, and that there was no separable controversy either at common law or under the statutes of Georgia. In an opinion by the chief judge it was held that the acts of negligence, charged against the individual defendants, involved both acts of omission and commission and were not merely matters of non-feasance for which the agents would not be jointly liable with the principal. The Court further held that the objection that the liability of the R. R. Co. was statutory and that of the other defendants at common law made no difference in the right to join the defendants, and that under the statute law of Georgia the acts of negligence, set out in the declaration against the individual defendants may have amounted to criminal negligence in which event both the R. R. Co. and the individual defendants were jointly liable to the plaintiff under the law of the state. In view of the conclusion which the learned court reached, it further held that the case was ruled by Alabama G. S. R. Co. vs. Thompson, 200 U. S. 206. We agree with that conclusion. In that case it was held that for the purpose of determining the removability of a cause the case must be deemed to be such as the plaintiff has made it in good faith in his pleadings."

Every question presented by this record, having been so fully passed on and settled by this court for a number of years, and the question presented not being an open question any more, we respectfully submit that the suing out of the writ of error in this case was merely for delay, and pray that ten per cent damage be awarded under Sec. 2 of Rule XXIII of this Court, and that the writ of error be dismissed.

KENDALL B. RANDOLPH,
BOYD DUDLEY,
J. A. SELBY,

Attorneys for Defendant in Error,
Albert H. Schwyhart.

In the Supreme Court of the United States

Office Supreme Court, U. S.
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OCTOBER TERM, 1912.

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THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND MARTIN A. BARRETT ..... *Plaintiffs in Error*

vs.

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IN ERROR TO THE KANSAS CITY COURT OF APPEALS OF THE STATE OF MISSOURI.

SUPPLEMENTAL BRIEF AND ARGUMENT OF DEFENDANT IN ERROR. ALBERT H. SCHWYHART.

F. C. DILLARD,
PAUL E. WALKER,
For Plaintiffs in Error.

KENDALL B. RANDOLPH,
BOYD DUDLEY,
J. A. SELBY,
Attorneys for Defendant in Error, Albert H. Schwyhart.

Nelson-Hanne Ptg. Co., St. Joseph, Mo.

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BRIEF.

The plaintiffs in error contend that the allegations of the petition of the plaintiff below, with reference to the negligence of the resident defendants, charges acts only of non-feasance, and not acts of mis-feasance. The case of Harriman, et al vs. Stowe, 57 Mo. l. c. 98 and 99, cited by them, does not bear out their contention, but on the contrary, quotes approvingly the following language, l. c., 99:

> "In the case of a strict negligence by a servant, while employed in the service of the master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence, at the same time and under the same circumstances; the servant in fact, and the master constructively, by the servant, his agent."

Further on, on the same page, the following language is used:

> "The present case seems to be one, not of mere non-feasance or omission, but of strict negligence or wrong. The agent undertook and proceeded to build a trap door, but did it so negligently as to cause the injury; under such circumstances the action would be maintainable against the agent and the principal also."

In the case of Steinhauser vs. Spraul, 127 Mo. 541, cited and largely quoted from by plaintiffs in error, the language quoted is used by Judge Sherwood as quoted, but of the seven judges composing the court In Banc, but one, Robinson J., concurred with him. The other five did not concur in that language; and so it cannot be said to be the language of the court, but the language of a minority opinion.

None of the cases, cited by plaintiff in error, show any state of facts similar to the state of facts alleged in the petition of the plaintiff below.

Barrett was a vice-principal, and Schwyhart was lead into danger by him and placed in a dangerous position by him, according to the allegations of the petition; and the State Court, (which is conclusive), found that he was jointly liable with the railroad company.

There can be no question but that the petition states a cause of action against Frank Novak, as it is distinctly alleged that Novak, although he knew, or by the exercise of ordinary care and prudence on his part, must have known of the dangerous situation of the plaintiff, carelessly and negligently signalled said freight engine to back against and onto the said St. Joseph passenger train, without giving to the plaintiff any warning whatever. Signalling the train to back, while he knew the defendant in error was in a dangerous situation, is not an act of non-feasance, but clearly an act of mis-feasance

The petition also states a cause of action against the defendant, Reed. It charges that he was trainmaster, and was present in person at the Altamont yards, and that he knew that

plaintiff's duties required him to go between the cars, and that, unless notified to the contrary, the plaintiff would only keep watch of the engine of the St. Joseph passenger train, and that, knowing the plaintiff would be placed in such dangerous situation, he ordered the work done in an unusual manner without giving to plaintiff any warning. It is true that the *evidence* showed that Reed did give notice to Barrett, which no doubt was all that was required of him, as Barrett was the immediate foreman over plaintiff; but Reed was not excused or excusable under the *allegations of the petition*, but showed under the evidence a full discharge of his duty by notifying Barrett, the foreman over plaintiff.

Kendall B. Randolph